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cases of inheritance. It may have been an arbitrary limitation but it has come down from very ancient times and was taken as a good working rule see *Manu* Chap III vers 5 *Gautami* Chap IV verses 2-7 *Apastamba* Chap II verses 11-15 *Visistha* Chap VIII verses 1-2. And when blood connection (which had always been the ground of the prohibited degrees for marriage) was taken to be also the ground for the right of inheritance it was natural to take the same limitation as part of the new doctrines and so we find that modern authoritative commentators have assumed that the limitation of 5 degrees through the mother applied to *bandhu* inheritance see *Mayer's Hindu Law* (10th Ed.) pages 690 692 786 787 *West and Buhler* (3rd Ed.) 121 488 489, *Dr. Jolly's Tigori Lectures* pages 213 214 *Lallubhai v. Manjumarbar* (1) *Umara Bahadur v. Udoi Chand* (2) *Babu Lal v. Vanku Ram* (3) *Bhujah Ram Singh v. Bhujah Ugra Singh* (4) and the *Dattaka Mimamsa* section 6 verse 10 dealing with the question of the succession of adopted sons. Against this there is only the opinion of G. C. Sanyal who is alive and might have been called as an expert as he was in a case recently heard by this Bench. The reason for some limitation for *sapinda* relationship in the matter of marriage is said in the *Acharya Smriti* to be that without it all the world would be connected and there would be no possibility of marriage. The same reason would apply to inheritance for all the world would be *bandhus* of a deceased person and the provision for inheritance by fellow pupils teachers, Brahmins and the Crown would be absurd. It is suggested that the adoption of this rule in matters

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(iii) that evidence was inadmissible to prove the dishonourable purpose for which Khigendra's false name was assumed

(iv) that the evidence on the record of association with Pulin Behary Das and the Anandini Society were irrelevant for the purpose of proof of the conspiracy charged in that case and should not have been admitted

(v) that the expression *Maver Lu* had in itself no evil significance, and was frequently used by a person in distress who found all effort unavailing and realised how inscrutable were the ways of Providence

(vi) that an abstract philosophical discussion on Yoga could not rightly be cut up into isolated sentences and selected as to furnish a possible text for revolutionary spirits without positive proof that it was so used

(vii) that the fact that the name of Dimesh appeared in a list found at the search of the house of one Madan Mohan Bhounick (of whom nothing was known) was not only valueless but not admissible against the accused being irrelevant for the purposes of the trial

(viii) that since the cypher list was not put to the witness who had been called to prove Dimesh's handwriting on two post cards and who had been shown that cypher list by the police outside Court, the defence could make the legitimate comment that that was because he had failed to recognize the handwriting, and the Sessions Judge should not have proceeded in his judgment to compare that document with the writing on the post cards with a view to determine whether it was in the handwriting of Dimesh

Barindra Kumar Ghose v Emperor (1) and *Kurali Prasad Misser v Anantaram Hazra* (2) referred to

(i) Appeals by each of the five accused—Amrita Lal Hazra alias Sasanka, and four others.

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The facts of the case (commonly known as the

(1) (1903) I. L. R. 37 Calc. 467, 503, (2) (1871) 8 B. L. R. 490, 502,

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of inheritance would lead to an absurdity, as the sons of the appellants (claiming through their father and so having 7 degrees) would clearly be *bandhus*, but there is no doubt the rule did apply to marriages, where equally absurd results would be produced. It is also said that limitations in the case of marriage have varied, so that the rule is not really definite. But the rule the *Mitakshara* would naturally adopt, is obviously the one stated by its author (namely 7 and 5 degrees) in the *Acharya Kanda*. The variations are set out in Mayne's *Hindu law* (7th Ed.), page 103.

Manu and Apastamba are the only writers who are supposed to adopt a different limit in the case of relationship through a mother. The difference ascribed to Manu is due to a gloss of Kulluka see Mandlik, page 410, note (line 33), and the text of Apastamba was very fragmentary and uncertain. The adoption of the rule of 7 and 5 degrees may have been only a blind following of the rule laid down for marriage—adopted as part of the distinction of *sapindaship* put forward by the *Mitakshara*. But it is probable there was a definite reason for it.

In and prior to Manu, *bandhus* were not recognised as heirs at all see for authorities prior to Manu Vol. 2 "Sacred Books of the East," pages 132, 133 and 202 verse 21. Apastamba, Chap. XIV, sections 1-5; Gautama Chap. XXVIII, section 21, Vasistha, Chap. XVII, sections 79 and 81; and Manu, Chap. IX, sections 185-189. So that up to the era of Manu, the only persons who would inherit were *sapindas* and *sakutya*s, and possibly *samanodakas*, but in no case were persons claiming through a female recognised. The term *bandhu* is used in some of the more ancient treatises, but merely to denote *gotraja* relations, and not in the technical sense in which it is used in the *Mitakshara*.

(iii) that evidence was inadmissible to prove the dishonourable purpose for which Khagendra's false name was assumed

(iv) that the evidence of the record of association with Pulin Behary Das and the Anusilan Samity were irrelevant for the purpose of proof of the conspiracy charged in that case and should not have been admitted

(v) that the expression *Mater Dei* had in itself no evil significance, and was frequently used by a person in distress who found all effort unavailing and realised how inscrutable were the ways of Providence

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14 C W N 1114 1138 16 W R. (P C) 16

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AMITA LAL
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'Raj-Bazu Bomb case') out of which these appeals arose were very briefly as follows —

Amrita Lal Hazra *alias* Sasankisekhara Roy, Dinesh Chandra Das Gupta Suddi Chandra Gaha and Chandrasekhara De were charged with having had in their possession under their control in a room in No 206 1 Upper Circular Road, on the 21st November 1913 materials for making bombs with intent by means thereof to endanger life and with having thereby committed an offence punishable under section 1 (b) of the Explosive Substances Act (VI of 1908). These four accused together with Upendra Lal Roy Chowdhury *alias* Kalipada Ghosh and Khagen-dra Nath Chondhury *alias* Suresh Chandra Choudhury were further charged with conspiring between March 1911 and the 21st November 1913 with Satis Chandra Chatterjee *alias* Satis Chandra Bhattacharya Bhupendra Nath Sen Profulla Ranjan Gupta Joges Chandra Roy Nimal Kanta Roy a person known as Bhoja and other unknown persons to make and keep explosive substances with intent by means thereof to endanger life or make other persons to endanger life thereby committing an offence punishable under section 120 B of the Indian Penal Code. On the 21st February 1914 Mr H M Veitch Joint Magistrate of 21 Purguns had committed the above six accused to take their trial before the Court of Sessions afterwards adding the 7th accused Harimov Banerji. Mr I B H Panton Additional Sessions Judge 21 Purguns tried the case with the aid of two assessors Bibus Pratip Chandra Choudhury and Bismita Kumar Chakraborty.

The accused with the exception of Sasankisekhara had declined to make any statement to the committing Magistrate Mr H M Veitch. In the Sessions Court they disclosed nothing orally but filed lengthy

should add that I am fortified in the view that I have expressed by a consideration of the provisions of Order XVI r 4 of the English Procedure Rules (see *Compania Sinsiment de Carne Congeladas v Houlder Brothers* (1) and the notes in the English Annual Practise for 1915 at p 221). Order I, rule 3 of the Civil Procedure Code is very similar in terms in fact almost identical with Order XVI r 4 of the English Procedure Rules and is probably founded thereon and consequently the opinions expressed in Order XVI r 4, by the English Judges may well be considered in construing the provisions of Order I r 4. I accordingly overrule the preliminary objection.

W M C

Attorney for the plaintiff *N C Dutt*

Attorney for the defendant Ghulam Mowlah *H C Bannerjee*

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 ALL HADDIZ
 &
 ABUL
 RAHMAN
 GREAVES J

(1) [1910] 2 K. B. 354

THE HIGH COURT,

1915.

Chief Justice:

THE HON'BLE SIR LAWRENCE H JENKINS, KT, KCIE
(Retired Nov 14, 1915)

„ SIR JOHN GLOUGE WOODROFFE, KT (*Acting*)

„ SIR LANGLFLOT SANDERSON KT, KC

Puisne Judges:

THE HON'BLE SIR JOHN G WOODROFFE

„ SIR ASUTOSH MOOKERJEE KT CSI

„ H HOLMWOOD

„ C W CHITTY

„ L E FLETCHER

„ S SHARFUDDIN

„ H R H COYE (*Retired Nov 14 1915*)

„ SIR HERBERT W C CARNUFFT, KT, CIE
(*Deceased*)

„ D CHATTERJEE

„ N R CHATTERJEA

„ W TEUNON

„ T W RICHARDSON

„ A CHAUDHURI

„ S HASAN IMAM

„ C P BEACHCROFT

„ H WALMSLEY

„ E P CHAPMAN (*Additional*)

„ B K MULLICK (*Additional*)

„ W E GREAVES (*Additional*)

„ B B Newbould (*Additional*)

„ F R Roe (*offg*)

THE HON'BLE G H B KENRICK KC *Advocate General*

„ B C MITTER *Standing Counsel*



CORRIGENDA

- Page 48 line 22 *for* busines *read* business
 Page 72 lin 8 of head note *for* finds *read* binds
 Page 93 line 7 *for* Lnd *read* Loyd
 Page 117 line 23 (head note) *for* Court *read* Courts
 Page 119 line 13 *insert* R C *after* Limba
 Page 227 line 1 *for* Courts *read* Court
 Page 227 line 26 *omit* comm *after* only
 Page 227 line 27 *for* person *read* receiver
 Page 385 line 20 (head note) *for* relation *read* relation
 Page 386 line 1 *for* mali holder *read* male holder
 Page 390 line 18 *for* mothers *read* mother's
 Page 393 line 15 *for* woul *saptamat* *read* words a
 saptamat
 Page 399 lines 21 and 22 *for* bindhus *read* bandhu
 Page 490 line 9 *after* Waters *insert* form put
 Page 505 line 19 *for* Grun *read* Grun
 Page 507 line 17 *for* equal *read* equal right
 Page 524 line 24 *for* tidal *read* tidal
 Page 528 line 20 *for* public *read* public
 Page 535 line 19 *for* Walkins *read* Wattins
 Page 716 line 21 *after* 1870 *insert* By doing so the
 High Court had put a wrong restriction
 Page 751 last line (ref) *for* C L J 505 *read* C L J
 503
 Page 960 line 23 *for* adopted *read* adopted
 Page 962 line 33 *for* offence *read* offences
 Page 968 line 31 *for* his *read* had
 Page 1027 line 14 *for* he *read* he
 Page 1030 line 15 *for* 1830 *read* 1830
 Page 1036 line 21 *for* the *read* the
 Page 1036 line 22 *for* Mess *read* Messrs
 Page 1156 line 2 *for* Thon *read* John
 Page 1187 line 26 *for* rules *read* rules apply

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doubt affirmatively established—*Criminal Procedure Code (Act I of 1895) s 423* In an appeal from a conviction it is for the Appellate Court, as it is for the first Court to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the appellant has been established beyond all reasonable doubt. To hold that unless reasonable ground is given to the Appellate Court for differing from the lower Court the Appellate Court must accept its findings of fact is to approach the case from a wrong standpoint. *KANCHAN MALIK v. DINESH (1914) 1 L R 42 Cal.*

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—*Letters Patent 1865, s. 15—Judgment*—Order by single Judge on Original Side directing defendant to give security—*Civil Procedure Code (Act I of 1908), O XXXVII r 2* An order made by a single Judge sitting on the Original Side under O XXXVII, rule 2 of the Code of Civil Procedure, directing a defendant to give security as a term on which leave to defend should be given is not a judgment within the meaning of s 15 of the Letters Patent and is not appealable. *Justices of the Peace for Calcutta v. Oriental Gas Company, 8 B L R 433*, followed. *Sontak v. Ahmedbhai Isahibhai 9 Bom H C 398*, referred to. *BUKHLAL CHUNDERMULLI v. EASTERN BANK, LD (1915) 1 L R, 42 Cal.*

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—*Practice—Filing of certified copy of decree appealed from after the prescribed period of limitation without leave of the Court effect of—Inherent power of High Court—Ex parte order in application for review of order of dismissal passed at preliminary hearing, setting aside of, at final hearing of appeal—Civil Procedure Code (Act I of 1908) s 151, O XLI, rr. 1, 11; O XLVII, rr. 4, 7—Limita-*

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tion Act (IX of 1908) s 5 Where a certified copy of the decree appealed from was filed in the High Court after the prescribed period of limitation without leave of the Court, in an analogous appeal, and where the main appeal had already been dismissed at the preliminary hearing under O XLI, r 11 of the Code of Civil Procedure, but was restored on review, without notice to the respondent, after the aforesaid analogous appeal had been admitted by another Divisional Bench, at the final hearing of both these appeals on objection being taken by the respondent. *Held*, that the respondent was entitled to invoke the inherent powers of that Court. *Tikait Ajant Singh v. Christian, 17 C. W. N 862*, followed. *Held*, also, that non compliance with r 4 of O XLVII of the Code rendered the granting of an (*ex parte*) application for review (by the appellant) a nullity, as it was prejudicial to the respondent, and previous notice was necessary. *Held*, further, that under r 1, O XLI of the Code, filing of the decree of the Appellate Court was imperative and an appeal could not be said to have been preferred until that decree was filed. *ABDUL HAKIM CHOWDHURY v. HEM CHANDRA DAS (1914) 1 L R 42 Cal.*

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—*Suit to wind up partnership and for accounts—Preliminary decree referring suit to Assistant Referee—Question of disputed membership of firm—Report of Referee confirmed by final decree of Trial Judge—Omission to appeal from preliminary decree—Appeal from final decree raising question whether inquiry was rightly referred to Referee—Civil Procedure Code (Act V of 1908) s 97—Interest, liability for, of partner of firm after dissolution using assets of firm for business for his own benefit* In a

Appeal—contd

suit to wind up a partnership and to have accounts taken the membership of the firm was in dispute certain persons being by the plaintiff alleged to be partners and by the defendants to have been only employees remunerated by a share of the profits. An adjudication was made by the Trial Judge which declared that the partnership was dissolved as from 1st July 1907, and then ordered and decreed that "it is referred to the Assistant Referee of this Court to take the following enquiry that is to say (a) to enquire who were the partners entitled to share in the assets and goodwill of the partnership business (b) to take an account of the dealings of the parties with the assets of the partnership business. From that adjudication though it was appealable the appellants did not appeal. The Referee made the enquiries directed and and took the account. His report as to enquiry (a) was adverse to the appellants was objected to by them and was confirmed by the Trial Judge in his final decree. On an appeal by the appellants raising the question whether enquiry (a) was rightly included in the first adjudication or whether it was not one which should have been made by the Court itself—*Held* (affirming the decision of the Court below) that the first adjudication of the Trial Judge which included enquiry (a) was a preliminary decree under section 97 of the Civil Procedure Code 1903 and that the appellants not having pre-

sent a partnership one of the partners retains assets of the firm in his hands without any settlement of account, and apply to them in continuing the business for his own benefit, he may be ordered to

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account for such assets with interest thereon, apart from fraud or misconduct in the nature of fraud
ARMED MISJUDGMENT *See* **HINDU**
ABRAHAM SALEM (1916) I, L, R 42 Cal. 914

— in Criminal Cases: *See* **PRIVY**
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— power of: *See* **COURT** 451

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LEAVE TO APPEAL TO PRIVY
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Approver: *See* **PARDON** 856

Arbitration—Bengal Chamber of Commerce arbitration by—Arbitration Act (IX of 1899), s. 11—Arbitration clause in a contract—Reference to an Association—Rules of an Association for the conduct of arbitration proceedings referred to it, whether imported into the contract and binding on the parties thereto. Where a contract contains an arbitration clause by which it is agreed that any dispute arising out of the contract shall be referred to the arbitration of the Bengal Chamber of Commerce the rules of the Association are imported into the contract and are binding on the parties. *Per* JENKINS C.J. The decision in *Ganges Manufacturing Company Ltd v. Indra Chand I L, R 33 (IL 1169)* was binding on the learned Judge (of the Court below) and should have been followed by him. **CHAITRAM RAM *vs* **BRIDHICHAND KESMICHAND** (1915) I, L, R 42 Cal. 1140**

— **Act (IX of 1899) s. 14** *See*
ARBITRATION 1140

Arms, joint possession of: *See* **MISJOINDER OF CHARGES** 1153

Arms Act (XI of 1878) ss. 4, 5, 14, 17 (a), (f), 20: *See* **MISJOINDER OF CHARGES** 1153

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Arrest of Ship—Trespass—Absence of Notice—Cause of action—Admiralty jurisdiction—Letters Patent 1863 cl 32—Letters Patent, 1862, cl 31—Order of the Supreme Court, 1771, cl 26—Admiralty Court Act, 1840, (s 4 & Art c 65)—Admiralty Court Act 1861 (24 Vict c 10), s. 5—Colonial Courts of Admiralty Act 1870, (53 & 54 Vict c 27) s (2) (a), s. 35—Interpretation Act 1883 (52 & 53 Vict c 63) s 13 (2)—Maritime necessities—*In rem*—Wrongful seizure—Limitation of Art (1) of 1908) s 1 Arts 2 & 36, 39—Pleadings On the 31st June 1910 the respondent company instituted a suit *in rem* against the *Clan Mackintosh* in this Court as a Colonial Court of Admiralty for an amount alleged to be due to them for maritime necessities and obtained a warrant of arrest. The ship was arrested on the same day, and remained under arrest until her release on the 31st January 1912, the action having been dismissed two days earlier on the ground of absence of jurisdiction. The owners of the ship were the appellant company who had their office in Burma. On the 14th June 1912 the appellant company instituted the present suit in the ordinary original civil jurisdiction of this Court against the respondent company for the wrongful arrest of the ship. The suit as framed was based on malice or its equivalent but at the hearing the appellant company proceeded on the footing of the suit being one for mere trespass. Held that in the absence of proof of malice or its equivalent, a suit for simple trespass will not lie for the arrest of a ship. *The Walter D. Waller* [1893] p 202 *Venus v. Altersley* *The Evangelinos* 12 Moo P C 352 and *The Strathnaver* 1 R 1 A C 58, referred to. The arrestment of the ship was a judicial act of the Court, and an ordinary step in an

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Arrest of Ship—contd.

action *in rem*. Under the arrest, the custody and possession was with the Marshal or an officer of the Court and could not be regarded as a detention by the respondent company. The damage if any, suffered from the continuance of the officer's custody, and possession was due not to the default of the respondent company but to the law & delay. *Peruvian Guano Co v. Dieffenus* [1892] 1 C 166 followed. The foundation of the Admiralty jurisdiction of the High Court, more especially in respect of maritime necessities discussed. *The Tro Ellen* L R 4 P C 161 *The Heinrich Bjorn* L R 11 A C 270, *Murray v. Longford* 1 Fulton 95 *The Asia* 5 Bom H C (O C) 64, *The Portugal*, 6 B L R 323, *Bardot v. The Augusta*, 10 Bom H C 140 referred to. Assuming that the High Court in its Admiralty jurisdiction did not acquire jurisdiction over maritime necessities by any previous enactment, such jurisdiction would now rest in the Colonial Courts of Admiralty Act, 1870, which vests in it the powers described in section 5 of the Admiralty Act, 1861. Tooust the jurisdiction of this Court under section 5 it is not enough that the owners of the ship should be in fact domiciled in India or Burma; the domicile has to be proved to the satisfaction of the Court. *La parte Michael* L R 7 Q B (58 followed). Inasmuch as such proof was not produced before the Court when the order for arrest was made the order for arrest cannot be treated as *coram non iudice* or a nullity. Assuming that an action would lie in the absence of proof of malice or its equivalent the action would be for wrongful seizure under legal process and would be barred by Art 29 of the Limitation Act. It is imperative under Order VII rule 1 (e) of the Code of Civil Procedure that a

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Arrest of ship—<i>conclud</i>	
plant should contain "the facts constituting the cause of action and when it arose" MADRAS STEAM NAVIGATION, Co., Ltd. v SHANTANU WORKS, Ltd., (1914) 1 L. R. 42 Cal. 85 . . .	87

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Bail—Grounds of admission to:— Confession of a co-prisoner materially corroborated as to applicant— Relative powers of the High Court and Subordinate Courts to grant bail—Criminal Procedure Code (Act of 1898) ss 497 and 498 Section 497 of the Criminal Procedure Code contains a rule found	
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contrary. The extended powers given to the latter by s 495 are not to be used to get rid of the reasonable and proper provision of the law laid down in s 497. The High Court refused bail where a confession by a co-accused implicating himself and the petitioner was materially corroborated as to the latter by other evidence taken at the preliminary enquiry into offences under ss 307 and 337 of the Penal Code—*ASHRAF ALI v SUPERIOR* (1914) 1 L. R. 42 CALC

Bailiff—Writ or warrant authorizing him to give possession of immovable property—Use by bailiff of reasonable degree of force to effect removal of person refusing to vacate—Practice of bailiffs taking strangers as assistants—Time of delivery of writ of possession for

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execution—*Precedent trial of lengthy cases by Magistrates—Penal Code (Act XL) of 1860* s 323—*Presidency Small Cause Courts Act XV of 1882* s 43, 48—*Civil Procedure Code (Act V of 1908)*, O. XXI, rr 85, 97, and First Schedule, App F Form No. 1—*Practice*—A bailiff of the Presidency Small Cause Court in the execution of a writ, issued under s 43 of the Presidency Small Cause Courts Act, requiring or authorizing him "to give possession" of certain premises to the applicant, may use a reasonable degree of force in order to effect the removal of persons bound by the decree and refusing to vacate the same, notwithstanding the omission in the writ of words expressly authorizing their removal. *Quare* Whether the English Common Law or the Civil Procedure Code applies to the writ or warrant in question. In a writ of possession under the former, words expressly authorizing forcible removal are not inserted, but an order "to give possession" authorizes such removal, if need be, and, if the Code applies, the omission of such words is immaterial. O. XXI, r 97 of the Civil Procedure Code merely provides an additional or alternative remedy. Where the bailiff proceeded to the premises, and on the occupant's wife refusing to vacate pulled or dragged her out of the house, and the force used for the purpose caused her, when released, to fall on the ground whereby she received slight injuries—*Held*, that he was legally justified in the employment of such amount of force and could not be convicted therefor under s 323 of the Penal Code. In such cases it is impossible to calculate or apply with the utmost nicety the degree of force necessary and yet not more than sufficient. Observations as to the practice of bailiffs taking with

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them, as assistants' persons connected with the Court, and as to the time of delivery to them of writs for execution. Procedural conduct of trials by Magistrates condemned. <i>MURTHOY & SANJIBANI DAS</i> (1914) I L R 42 Cal. ..	313
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Bond—Slavery Bond—Public policy—Overwhelming interest Where in a bond the executant bound himself down to daily attendance and manual labour until a certain sum was repaid in a certain month and it penalised default with over-whelming interest— <i>Held</i> that such a bond was not enforceable it law being opposed to public policy.— <i>RAM SARUP BHAGAT & BANSI MADAR</i> (1915) I L R 42 Cal. ..	742
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Charge—Explosive Substances Act, 1883 (46 & 47 Vic. c. 5) s. 4—Explosive Substances Act (I of 1905), s. 4 (b) —Charge, specifications of—Accused a right to know value thereof Penal Code (Act XLV of 1860 as amended by Act VIII of 1913) ss 120, 120A, 120B, 121A—Explosive substance—By means thereof—"Unlawfully and maliciously—"Criminal conspiracy"—Misjoinder of charges—Criminal Procedure Code (Act V of 1898), ss 196, 235, 312, 300 (1) 417—"Same transaction," limits of—In order of charges under s. 1 (b) of Act VI of 1903 and s. 120 B of the Penal Code—Co conspirators, separate trial of—Crown's right to prosecute in respect of the question of ultimate decision—Presumption of innocence of accused, meaning of—Conspiracy charge of—Prosecution duty of—Explanation by a cruel want of, when fatal—Leading questions—Cross examination of its own witnesses by prosecution when permissible—Evidence Act (I of 1872) ss 10, 14, 15, 54, 135 143 154—Official witnesses for Crown whether privileged from disclosing source of information—Determine, whether so privileged regarding place of detention—Written statements of accused—Examination of accused—Comparison of hand writing by Court, propriety of—Possession—meaning of—Depositions reading over of, daily in open Court An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him But where the accused fully understood the nature of the offence with which	

Charge—*contd*

they were charged, they had clearly not been prejudiced by the omission of the words 'unlawfully and maliciously' and 'in British India' occurring in section 4 (b) of Act VI of 1908. Such an omission can be cured by the words *The Queen v Hunsford* [1895] 1 Q B 758, referred to. Where the illegal act charged under section 120 B is the unlawful and malicious possession of explosive substances within the meaning of section 4 of the Explosive Substances Act 1908, it is not essential to specify in the charge the explosive substances which the accused have conspired to have in their possession or under their control. A person may be guilty of criminal conspiracy even though the illegal act which he has agreed to do has not been done for 'the crime of conspiracy' consists only in the agreement or confederacy to do an illegal act by legal means (i.e. a legal act by illegal means). *Reg v Hibbert* 13 Cox 82 *Quinn v Leatham* [1901] A C 495 *The Queen v Maitland* 7 Q B D 244 14 Cox 383 and *O'Connell v The Queen* 11 C & L 155 1 Cox 413, 5 St Tr N S 1 referred to. The indictment in all cases of conspiracy must in the first place charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed. *The King v Gill* 2 B & Ald 204, *The Queen v Kenrick* 5 Q B 49, *The Queen v Blake*, 6 Q B 126 *Sydney v The Queen* 11 Q B 245, *The Queen v Gompertz* 9 Q B 824, 1 Cox 145, *Aspinall v The Queen*, 2 Q B D 48, *Taylor v The Queen*, [1895] 1 Q B 25, *Reg Parker*, 3 Q B 292 referred to. It is a wholesome rule that the Court should adhere to the language of the statute, as far as practicable, when a charge is drawn up, as

Charge—*contd*

nothing is gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge. The accused cannot be convicted on a conspiracy charge under section 120 B, Indian Penal Code unless the prosecution establishes that the accused were members of the conspiracy after the 27th March 1913 when Act VIII of 1913 became law. A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the 'same transaction', the circumstances which must bear on its determination in each individual case are proximity of time, unity or proximity of place, continuity of action and community of purpose or design. If A, B and C conspire to make or have in their possession or under their control, an explosive substance within the meaning of the Explosive Substances Act and, in pursuance of such conspiracy A makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit be charged and tried together under section 120 B Indian Penal Code and section 4 (b) of Act VI of 1908. If all the known co-conspirators named in the charge are not present on their trial the trial of some (separately) with or without the other is not vitiated. *Emperor v Lalit Mohan Chuckerbutty* 1 L R 38 Cal 559, 15 C W N 593 explained. If the accused have committed an offence under section 4 (b) of the Explosive Substances Act, 1908 in pursuance of a criminal conspiracy it is open to the Crown to prosecute them for such offences irrespective of the question of the ultimate design of the alleged conspiracy coming under section 121 A, Indian Penal Code (which charge requires previous sanction under section 196, Criminal Procedure

Charge—*contd*

CoD) In order to justify the inference of guilt the incriminatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt *R v Hoyle* 2 Lewin C C 227 referred to. The presumption of innocence (in criminal cases) signifies no more than this that if the commission of a crime is directly in issue in any proceeding it must be proved beyond reasonable doubt. The whole doctrine when drawn out is *first* that a person who is charged with a crime must be proved guilty that according to the ordinary rule of procedure and of fair reasoning, *presumptio pro reo* is regarded so that the accused stands innocent until he is proved guilty, and *second* that this proof of guilt must displace all reasonable doubt. In a charge of conspiracy general evidence of the existence of the conspiracy may first be given before particular facts are proved to show that one or more of the accused took part in it *R v Sulney* 9 St Tr 817 *Queen Caroline's Case* 2 B & B 284 1 St Tr 5 1314 *R v Hunt* 3 B & All 666 followed. Under the law in England facts similar but not part of the same transaction as the main fact are not in general admissible to prove either the occurrence of the main fact or the identity of its author except (after evidence *aliunde*, on those points has been given) to show the state of mind of the parties with regard to such fact, i.e., knowledge of its nature, or his intent. In general whenever it is necessary to rebut, even by anticipation the defence of accident mistake, or other innocent condition of mind evidence that the accused has been concerned in a systematic course of conduct of the same specific kind as, and proximate in point of time to that

Charge—*contd*

in question, may be given *R v Holt* (1869) 11 H 280 8 Cox, 411, to the contrary is no longer authority *R v Smith* 20 Cox 204 92 L J 1204 and *Imperial v Delenra Irosol* 1 L R 36 Cild 573 9 C L J 610 referred to. Section 4 of Act VI of 1908 substantially replaces the provisions of section 3 of 46 & 47 Vict Chap 3 (Explosive Substances Act 1883) consequently the expression unlawfully and maliciously may be interpreted in the sense in which it is familiarly used in the criminal law of England. Unlawfully thus signifies not for a lawful object and 'maliciously' signifies 'intentionally and without justification or excuse or claim of right' *The Queen v Clemens* [1898] 1 Q B 556 19 Cox 18, *Miles v Hutchins* [1903] 2 K H 714 20 Cox 555 referred to *Reg v Ward* 12 Cox 123 1 C C R 36 *McPherson v Daniels* 10 B & C 272 *Bromage v Prosser* 4 B & C 247 *Clark v Moynaux* 3 Q B D 237 *Allen v Flood* [1898] A C 1 *Johnson v Emerson* L R 6 Fx Ch 373 *Le v Penfleton* 2 C C R 119 12 Cox 607 *Mogul Steamship Co v McGregor* [1892] A C 25 23 Q H D 598 followed. The term explosive substance as used in section 4 (b) of Act VI of 1908 includes any part of an apparatus, machine, or implement intended to be used or adopted for causing or aiding in causing any explosive substance and "by means thereof does not mean by means thereof alone" *R v Charles* 17 Cox 499 referred to. The inference of fact may legitimately be drawn that the explosive substances made and possessed by Basunka were intended for use in British India. It is the duty of the prosecution not so much to secure a conviction as to place all the available evidence in the case fairly and fully before the

Charge—contd

tribunal by which alone the guilt or innocence of the accused is to be determined *Ram Ranjan Roy v King Emperor*, 1 L R 42 Cal 422 19 C W N 23 following *Regina v Holden* 8 C & P 606 referred to. The proof of the case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner, but upon the positive affirmative evidence of his guilt that is given by the Crown. But if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion he is called upon for his own sake and his own safety to state and bring forward the circumstances whatever they may be which might reconcile such suspicious appearances with perfect innocence *Regina v Ford* 4 St Tr N S 85 followed. While it is not necessary to prove manual possession of the explosive substance by the accused it must be proved that it was in his power or control possession to be punishable must also be possession with knowledge and intent. The mere fact that the other accused were in the room does not show they were in possession of all or any of the things contained therein. When the evidence at the disposal of the prosecution is insufficient to secure a conviction for the crime committed it is inexpedient even though it may be lawful to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime *Reg v Boulton* 12 Cox 87 and *Emperor v Talat Mahan* 1 L R 38 Cal 559 15 C W N 23 referred to. A man's guilt is to be established by proof of the facts alleged and not by proof of his character such evidence might create a prejudice but not lead a step towards substantiation of guilt. In India as in England, the accused

Charge—contd

are entitled in cross examination to elicit facts in support of their defence from the prosecution witnesses wholly unconnected with the examination in chief. In the course of cross examination of the character the defence are entitled in view of the generality of section 143 of the Indian Evidence Act, to ask leading questions. Under section 151 the Court has the discretion to permit the prosecution to test, by way of cross examination, the veracity of their own witnesses with regard to the (unconnected) matters elicited by the defence in cross examination. [While in the United States a party has no right to cross examine any witness, except as to circumstances connected with matters stated in his examination in chief and if he wishes to examine him respecting other matters he must do so by making him his own witness and by calling him as such in the subsequent progress of the case *Philadelphia and Trenton Railway Co v Simpson* 14 Peter 448 referred to.] The defence is not entitled to elicit from individual prosecution witnesses whether he was a spy or an informer, or to discover from police officials the names of persons from whom they had received information, but a detective cannot refuse, on grounds of public policy, to answer a question as to where he was secreted. *R v Watson* 32 St Tr 1 *R v Richardson* 1 Fox & Fin 693 A G v Bryant 15 M & W 169 71 R R 610 *Harlan v Beyfus* 25 Q B D 494, *Webb v Catchlove* 3 T L R 159 referred to. In strictly carrying out the provisions of section 360 (1) of the Criminal Procedure Code by the daily reading over in open Court of the deposition of each witness, the Court does not lay itself open to criticism though that procedure should occupy considerable time. *Mohend Nath v Emperor* 12 C W N 845 *Tosh Chandra*

Charge—*concl'd.*

Uk-rje- v. Emperor, I L R 36 Cal. 955, and *Kamitchinilan v. Emperor*, I L R 25 Mad 388 referred to. Though written statements may be accepted from the accused in accordance with the universal practice in the Courts under the Calcutta High Court they do not take the place of evidence nor of such examination of the accused as is contemplated by section 342 of the Code of Criminal Procedure. *Emperor v. Anwar* (1903) All W N 1 dissenting from *AMRITA LAL HAZRA v. EMPIOR* (1911) I L R 42 Cal. 937

Charter Act (24 & 25 Vic. c. 105) s. 15

See JURISDICTION. 926

Charter of the Supreme Court, 1774 cl.

28 SE ARREST OF SHIP. 85

Chattels See PLACES OF TIBETAN WORSHIP 455

Chaukidari Chakran Lands—*Village*

Chaukidari Act (Bengal) of 1870

ss 1, 18, 40, 50, 51 52 53—*Power*

of resumption and assessment of

chaukidari chakran lands—Zamindars

estates in Orissa—Regulation

XII of 1805 s 33—Regulation

XIII of 1805 s 41—Regulation I

of 1793 s 8 cl (4)—(this f

pr.) In this judgment the

Judicial Committee (affirming the

decision of the High Court) held,

on a consideration of the history of

Orissa and of the legislation

applicable to its settlement and

the nature of its zamindari estates

that the Government were under

the circumstances not entitled to

resume and assess with revenue

in being chaukidari chakran lands

Chaukidari Chakran Lands—*concl'd*

respect of which estates the revenue was settled in perpetuity. The history of chaukidari grants as set out in the judgment of Lord Kingsdown in the case of *Joykishen Woolerjee v. Collector of East Burdwan*, 10 Moo I A 16 referred to. The respondents in discharge of the duties imposed on them by their grants to maintain peace and order within their estates (the manner in which they were to carry out such duties being implicitly left by the Government to the zamindars as there was no machinery provided for the purpose in the legislation previous to 1870) retained in their service a large number of chaukidars whom according to the custom of the country, they remunerated by grants of land in lieu of wages. A register of these chaukidars was kept in the zamindari office, and in the appointment of the chaukidars in more than one instance, the Government Police Officer held a voice. But the record showed that the zamindars often changed the lands held by the men, and resumed what they considered to be in excess of their requirements. Bengal Act VI of 1870 was extended to Orissa in 1879. In suits by the respondents against the Secretary of State for a declaration that the Act did not apply to the lands in question—*Held*, that the onus was on the appellants to show that when the zamindars were confirmed to the respondents ancestors such confirmation was subject to reservations in respect of any land which gave the Government the power of resuming and assessing it and that onus had not been discharged. The power of resumption was reserved by Government in the old Regulations in respect of lands which had been set apart by the zamindar with their permission or under their authority. In Regulation I of 1793 the word used is "appropriated," in Regulation

(the zamindars of Sukinda and Madhupur) in Orissa with whose ancestors settlement had been made in 1803, and sanads granted by which statutory confirmation was given by section 33 of Bengal Regulation XII of 1805, and in

Chaukidari Chakran Lands—contd.

XIII of 1805 the expression "assigned" is employed but in both statutes the characteristics of the grants under which the lands were held, depended on the implied authorisation of the Government which excluded them from consideration in the adjustment of the jama of the mahal. In the present case the appellant had failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the respondents nor that there was any obligation on the part of the respondents to make such grants. The only obligation on them was to maintain peace and order within their zamindaries. They entertained the services of chaulidars for whose maintenance they allotted from time to time certain lands of their own free will. The mere fact that some appointments were made with the approval of a Government official could not alter the nature of the grants. The word assigned in the definition section of Bengal Act VI of 1870 means land assigned by Government, or appropriated under their authority or with their permission. Not only did the form of the transferring order in Schedule C of the Act clearly show that the expression assigned is applied to lands assigned by Government for the maintenance of the chaulidars and in respect of which they reserved the right to resume and transfer to the zamindar subject to an additional assessment but the resolution by which the Act was extended to Orissa leaves no possibility of doubt what the Government understood the Act to mean. In the orders passed a distinction is made with regard to chaukidari holdings in the temporarily settled tracts and those situated in 'permanently settled estates'. With regard to these it is declared that on resumption "the holdings should be included in

Chaukidari Chakran Lands—concl'd

the estates within which they lie, and form part of its assets in the future." Nothing can be clearer that the Act was designed to deal with lands which, although lying within a mahal, did not form part of its assets which was not the case with the respondents' zamindaries. SECRETARY OF STATE FOR INDIA v. KIRTIDAS BHUPATI HARICHANDAN MAHAJATRA (1914) 1 L R 12 Cal

710

Cheque, payment by—Effect of such payment—Part payment—Limitation—Limitation Act (IX of 1908), s 20—Continuous account. If a cheque is delivered to a payee by way of payment and is received as such it operates as a payment subject to a condition subsequent that if upon due presentation the cheque is not paid the original debt revives. Where such a cheque is signed by the debtor and paid in part payment of the principal of a debt, the cheque being subsequently honoured the proviso to s 20 of the Limitation Act has been complied with. *Mackenzie v. Pirumengida* than 1 L R 9 Mad 271, distinguished. Where the claimant is

ANIL K. MAHAJI SIKRA v. JIVABABHU SANA (1915) 1 L R 42 Cal

1043

Chota Nagpur Encumbered Estates Act (Beng. VI of 1876) s 17: See PATNI LEASE

1020

Chukani Right—Contract of sale of a chukani tenure—Misrepresentation by non-disclosure of facts—suit for rescission by purchaser—Transfer of Property Act IV of 1882 s 55—Duty of seller. A chukani tenure in the District of Rungpur is not a temporary tenure under the Transfer of Property Act terminable at six months' notice, but a *rariyat* leasehold which may develop into occupancy right. When the vendor

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Chukani Right—*concl'd*

is informed by the purchaser of his object in buying certain property and the *has* contains covenants which will defeat that object, mere silence will, in equity, be equivalent to misrepresentation. *Flight v. Birt* 3 My & K 282, followed. JOHNDRA NATH GOSWAMI v. CHANDRA KUMAR MOZUMDAR (1914) I. L. R 42 Cal

28

Civil Courts Act (XII of 1887) ss. 8, Sub-s. (2), 22, Sub s. (3): See TRANSFER

842

Civil Procedure Code (Act XIV of 1882), s. 244. See ORIGINARY HOLDING

172

ss. 626, cl. (b) 629 See REVIEW ..

630

Civil Procedure Code (Act V of 1908), ss. 2 (2), 98, 104; O XLIII, r. 1: See LIMITATION OF DECREE

440

s. 10: See JURISDICTION

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s. 16: See JURISDICTION

942

s. 47, O. XXI, rr. 58, 60: See EXECUTION OF DECREE—SHIRAIT

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ss. 47, 75: See RAFFABLE DISTRICTION

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s. 75: See CO-OPERATIVE SOCIETY

377

s. 82, O. I, r. 5. See PARTIAL

1135

s. 87: See APPEAL

914

s. 99: See HINDU LAW—RELIGIOUS ENDOWMENT ..

536

s. 102: See HOMESTEAD LAND

638

s. 107, O. XII, r. 4, application of: See COSTS

451

s. 110: See LEAVE TO APPEAL TO PRIVY COUNCIL

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O. XXXIV, rr. 3, 6: See LIMITATION

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O. XXXIV, rr. 4, 5: See LIMITATION

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O. XXXIV r. 14: See MORTGAGE

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O. XXXVII, r. 2: See APPEAL

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O. XLVII, r. 27 O. XLVII, r. 1

675

O. XLVII rr. 4 7 See APPEAL

433

O. XLVII, rr. 4 (b) (2) (b) 7 (1) (b) See REVIEW

830

Co-conspirators, separate Trial of See CHARGE

957

Co-operative Societies Act (II of 1912) ss. 19, 20 See CO-OPERATIVE SOCIETY

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Co-operative Society—Charge—Priority—Co-operative Societies Act (II of 1912), ss. 19, 20—Attachment—Civil Procedure Code (Act V of 1908) s. 73 Under s. 73 of the Code of Civil Procedure the claim of a co-operative society cannot be enforced unless they have a decree or charge under s. 20 of the Co-operative Societies Act (II of 1912) though under s. 19 of that Act the society might have raised an objection to the attachment by reason of other sections of the Code of Civil Procedure ABDEL QUADIR v. SHAHBAZPUR CO-OPERATIVE BANK (1914) I. L. R 42 Cal

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Collector See INCOME TAX	151
Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27, ss. 2 (3) (a), 35: See APPEAL OF SHIP	83
Commercial Intercourse with Enemies Ordinance (VI of 1914) s 3 See TRADING WITH THE ENEMY	104
Commission: See PARDANASHIN EXAMINATION	19
Commitment: See APPROVER	85b
Duty of Magistrate to examine witnesses not produced but whom the accused is prepared to produce after process—Application to summon witnesses and for time to file documents made after the commitment order—(Criminal Procedure Code (Act V of 1898) s 309—Practice—A Magistrate is bound, before passing an order of commitment to examine all the witnesses produced by the accused but not those whom he is prepared to produce after process (Stand for their appearance <i>Queen Empress v. Ibrahim</i> I L R 21 All 264 referred to <i>Emperor v. Mhammat Hali</i> I L R 26 All 177) ordered from a Magistrate does not act illegally unless s 208 of the Criminal Procedure Code in refusing an application for summons on witnesses and for time to file documents made after the order of commitment has been passed (LAFBOR v. SURATH (1914) I L R 42 Cal 608	608
Company See PROVIDENT INSURANCE	300
Compensation for Wrong to Land: See JURISDICTION	942
Complainant—Absence of complainant—Cause called on by mistake on date not fixed for hearing—Order of acquittal—Effect of such order—Jurisdiction of Magistrate to proceed with trial thereafter—Criminal Procedure Code (Act V of 1898) s 217 An order of acquittal under s 247 of the Criminal Procedure Code passed by mistake on a date not fixed for the hearing of the case, for absence of the complainant,	

Complainant—concl

is a mere nullity, and does not deprive the Magistrate from proceeding with the trial on the discovery of the error *H C Proceedings 17 Aug 1875, 2 Weir 307*, followed *Suresh Chandra Saha v. Banku Sadukhan* 20 L J 622 distinguished *ACHARYA MANDAI v. MAHATIA SINGH* (1914) I L R 42 Cal

Complaint—Personal presentation of complaint—Complaint of defamation: presented by alleged agent of pardanashin but not signed by her—Power of attorney not filed in Court—Necessity of examination of complaint before issue of process—Examination of pardanashin or commission—Criminal Procedure Code (Act V of 1898) ss 198, 201 503—At once. The word 'at once' in s 200 of the Criminal Procedure Code clearly indicates that a complaint must ordinarily be presented in person otherwise a Magistrate should (every body) take cognizance, and should not accept a complaint not signed by the alleged complainant and not preferred by a person duly authorized to institute the specific complaint. No process can be issued against the accused either by the Magistrate first taking cognizance or by the Magistrate to whom the case is transferred unless and until the Magistrate issuing it has first examined the complainant and this course is the more necessary in the case of a pardanashin to enable the Magistrate to satisfy himself that the complaint is really her action. When a pardanashin makes a complaint the Magistrate may take cognizance to satisfy himself that it is really her complaint, by whatever means it reaches him. When it is presented on her behalf the Magistrate may, under s 503 of the Code, issue a commission for the examination required by s 200. Section 503 is very wide in its terms and

Complaint—*cond*

refers not only to an inquiry or trial but to any other proceeding and authorises the examination of any witness, which includes a complainant. When a written complaint of defamation was presented by an alleged agent on behalf of a *jarlanashin*, but it was not signed by her, nor was any power of attorney filed before the Magistrate and he issued process without examining the complainant. *Held* that he had no power to issue process in such a case. *ABHAYE WARI DEBI v. KISHORI MOHAN BANERJEE* (1914) I L R 42 Cal

19

Compromise—*cond*

suit to enforce it which was compromised the terms of the agreement being in effect to pay off the mortgage debts and to divide the properties into specific shares which were to be legally conveyed by the mortgagor to the parties respectively entitled to them and a decree was made by the Court that the suit be decided in pursuance of the terms of the compromise and the suit be struck off from the list of cases. No conveyances were executed by the mortgagor in compliance of the contract to that effect in the compromise nor was the agreement of compromise, registered nor its terms incorporated into the decree but it was acted upon and carried out by all the parties to it, and by their successors in title and for a period of 30 or 40 years prior to the present suit the rights of all the parties had been dealt with upon the same footing as if the mortgagor had made an express conveyance partly with the equity of redemption and transferring allotted shares of the property itself to the mortgagors and reserving one share for herself. *Held*, that if the agreement of compromise was defective as not being registered the decree had been obtained only on one footing namely that the parties to the suit had in fact arranged their rights in the property in terms of the compromise. And even though the compromise and the decree taken together were considered to be defective or inchoate as claims making up a final and validly concluded agreement for the extinction of the equity of redemption the acts of the parties had been such as to supply all defects. When the acts and conduct of the parties are laid upon, as in the performance or part performance of an agreement the *flexa penitentia* which exists in a situation where the parties stand upon nothing but an engagement which

Compromise—*Compromise of suit relating to mortgages—Agreement of compromise not registered and not incorporated in decree—Suit for redemption of mortgages—Agreement for extinction of equity of redemption and for division of properties amongst the parties to mortgage deeds—Agreement for compromise given effect and carried out by acts and conduct of parties though document is ineffective to prove contract—Principle that Court will uphold a contract carried into effect by acts and conduct of parties.* In this case the Judicial Committee (affirming the decision of the High Court) held in a suit for the redemption of two mortgages executed in 1848 and 1871 respectively between the predecessors in title of the parties that the equity of redemption had under the circumstances, been extinguished. In 1870 an agreement was come to by the then representatives of the mortgagor and mortgagee in reference to the mortgage of 1848. Sums were fixed as being the principal and the interest due, and arrangements were made for payment by yearly instalments, and for the management of the property. In 1873 differences arose between the parties to that agreement and the mortgagee brought a

Compromis—concl'd

is not final or complete is excluded. For equity will support a transaction of the imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. The principles laid down in *Maddison v. Alderson*, 1, R 8 A C 167, *Bell's Commwaries*, 10th Ed., section 26 and *Potter v. Potter* 1 Ves Sen 447, followed. There was nothing in the laws of India inconsistent with these principles, on the contrary, those laws followed the same rule.

MOHAMMED MUJA V. ALI RAUF KINAB
(1911) 1 L R 42 Cal

801

Computation of Time. See LEAVE ON APPEAL TO PRIVY COUNCIL

35

Conditional Order. See PLAIN AND SIMPLE

702

Confession by Co accused. See BAIL

25

Confessions of Accused: See JURY TRIALS

789

Confiscation—Cargo—Enemy ship—
Cargo shipped by British subjects before declaration of war—War declared whilst cargo at sea—Cargo consigned to German merchants (in one instance to British merchant)—Destination (Enemy Port)—Contracts C. I. F.—Money advanced by British Banks against documents of title—Property in goods at the time of capture. On August 4th 1914 war was declared between Great Britain and Germany. Before the declaration of war H. C. & Co., British subjects, had shipped some bales of jute by a German ship, the SS *Rappensfels* of the Hansa Line, and had consigned the goods to D. G. & Co., British merchants. G. & Co. and G. W. & Co. had also shipped goods by the same ship but had consigned the goods to German merchants. The *Rappensfels* was captured at sea after the declaration of war and condemned as good and lawful prize at Colombo. The *Rappensfels* was sent to Calcutta to have the

Confiscation—concl'd

liability of the cargo to condemnation determined by the High Court at Fort William in Bengal. Messrs H. S. N. G. & Co., G. & Co., and G. W. & Co. submitted claims for the release of their goods. These claims were disputed by the Crown.—*Held*, (i) that in determining the question of liability of the goods to confiscation, regard must be had to the property in the goods and not to the risk except so far as it may assist the Court in determining the answer to the question—“To whom did the goods belong at the time of capture?” (ii) that the sellers did not pass the property in the goods to the buyers at the time of appropriating the goods to the contract, and (iii) that in the circumstances the property in the goods was in the sellers and they were not liable to be confiscated. *RF CARO & S. S. RAFFENFELS* (1914) 1 L R 42 Cal

334

Consent of Court: See MAHOMEDAN LAW—MARRIAGE

331

Consent of Landlord: See TRANSFERABILITY

172

Consent of Parties: See JURISDICTION

116

Consolidated Rate: See RATES AND TAXES

625

Conspiracy: See CHARGE

957

Construction. See HINDU LAW—WILL

361

Constructive Notice. See RATES AND TAXES

625

Contempt of Court—Practice—Appeal

—Assisting in contempt—Procedure

Where the prohibitory injunction on the defendant firm made no mention of M, an assistant, or of servants and agents, but the notice of motion for committal for breach thereof was upon M who did nothing after service on him of the injunction. *Held*, that the notice of motion was erroneous, and the procedure which had been adopted was misconceived. The proceedings against M, if any, should have been

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Contempt of Court—<i>concl'd</i>		Costs—<i>concl'd</i>	
for assisting in a contempt of Court. <i>Held</i> also (on the merits) that there had been no contempt or participation in contempt on his part as all that he did had been done prior to the suggestion. <i>MAPSAIL & GRANDHI VENKATA RATNAM</i> (1915) 1 L R 42 CALC 1149		<i>Blacarr Sahas Singh</i> , 1 L R 34 CALC 878 and <i>Ram Kamal Sahas v Akhad</i> (1911) 1 L R 30 CALC 429 referred to. <i>AMBIKA PRASAD SINGH & PANDIT SINGH</i> (1914) 1 L R 42 CALC 451	
Contentious Matter See <i>INTERVAL</i> 109		Court, duty of See <i>INTEREST</i> 690	
Continuous Account See <i>CHEQUE PAYMENT</i> 1043		Court fee — <i>Plaint—Valuation of Suit—</i>	
Contract See <i>ARBITRATION</i> 1140		<i>Court Fees Act (VII of 1870) s 7</i> and (d) cl (c) In a suit for a declaration that a decree for over 22,000 was valid and might be set aside the plaintiffs who were interested only in three annas share of the property which was valued at Rs 1000 were required to pay court fee for the whole of the decretal amount — <i>Held</i> that the plaintiffs must value their suit according to the extent of their claim and the court fee need there fore be paid only upon the amount. <i>Plut Kumari v Ghanshyam Mera</i> 1 L R 35 CALC 202, and <i>Harishar Prasad Singh v Syam Lal Singh</i> , 1 L R 40 CALC 615 referred to. <i>GANESH BHAGAT & SARADA PRAKASH MUKHERJEE</i> (1914) 1 L R 42 CALC 370	
———— See <i>COMPROMISE</i> 801		Court Fees Act (VII of 1870) s 7 Sub s	
———— See <i>UNLAWFUL ENFORCEMENT</i> 286		(d) Cl (c) See <i>COURT FEE</i> 370	
Contract Act (IX of 1872) ss 11-19		Criminal Case See <i>APPEAL</i> 374	
See <i>UNLAWFUL ENFORCEMENT</i> 286		Criminal Cases Appeal in See <i>PRIVATE COUNCIL</i> 174 CALC OF 789	
————, ss 15, 74, 652 690		Criminal Conspiracy See <i>CHARGE</i> 957	
————, s 37 See 8-C		———— Proof of See <i>MISJOINDER OF CHARGES</i> 1153	
DAMNIFAT RULE OF		Criminal Procedure Code (Act V of 1898)	
————, s 72 See 151		ss 75 (1) See <i>WARRANT VALIDITY</i> 708	
INCOME TAX		————, ss 118 122 See <i>SUPPLY</i> 706	
————, s 230 (c) 1050		————, ss 133 137 See <i>PUBLIC NUISANCE</i> 158 702	
See <i>SALE OF GOODS</i> 1050		————, ss 145, 358 (1), (3) See <i>DISPUTE CONCERNING LAND</i> 381	
Contract of Employment See <i>BROKER</i> 1050			
Contract C I F See <i>CONFIRMATION</i> 334			
Conveyance by Executor See <i>VENDOR AND PURCHASER</i> 56			
Conviction See <i>APPEAL</i> 784			
Corroboration See <i>CONVICTION</i> 1044 101 CO 789			
Costs—Partition—Civil Procedure Code (Act V of 1908) s 107, O XXI r 4			
application of—Appellate Court power of It is not necessary for the application of O XII r 4 of the Code of Civil Procedure that the decree should proceed on every ground common to all the plaintiffs or defendants. It is quite sufficient if it proceeds on any ground common to the party to which the appellate belongs. Under s 107 of the Code the Appellate Court has the same power as the Court of first instance. <i>Shama Soodhuree Debta v Jai ne Shukler & Co</i> 12 W R 160 <i>Dildar Ali Khan v</i>			

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Criminal Procedure Code (Act V of 1893).		Damdupat, rule of—Mortgage between	
s 195. See SANCTION FOR PROSECUTION	667	Hindus, whether the rule of Damdupat applies to—Transfer of Property Act (IV of 1882) s 4—Contract Act (XV of 1872) s 37.	
ss 198, 235 342, 350 (1) 417: See CHARGE	957	There is nothing in the Transfer of Property Act (read with the Contract Act) to preclude the rule of Damdupat from applying to mortgages between Hindus. <i>Udhwa Sultania Onahini Nudhi v Venkataramanjulu Nandu</i> I L R 26 Mad 662, not followed. In the matter of <i>Itari Fall Yelluck</i>, I L R 33 Cal 1269. <i>Vanda Lal Roy v. Dharendra Nath Chakravarti</i>, I L R. 40 Cal. 710, <i>See camba v. Manordas Lachmondas</i>, I L R 35 Bom 190 and <i>Saniara bai v Jayarant</i> I L R 24 Bom 114, referred to. <i>KUNJA LAL BANERJI v NARSIMHA DEBI</i> (1915) I L R 42 Cal.	820
ss 138, 230, 503: See COHABITANT	19	Darbhanga Raj: See HINDU LAW—CUSTOM	582
s 238: See COHABITANT	608	Death, sentence of: See PRIVY COUNCIL PRACTICE OF	739
s. 239: See MISJOINDER	760	Debt—Charge—Assignment—Transfer of Property Act (IV of 1882) s 55 sub s (4) There is no authority for the contention that a charge such as the one mentioned in s 55, sub s (4) of the Transfer of Property Act, is merely a personal right which cannot be transferred to an assignee. The debt could undoubtedly be transferred and there is no reason why the security for the debt should not also be transferred with it. <i>Itari Ram v Denapat Singh</i>, I L R 9 Cal 167 and <i>Moti Lal v Bhagwan Das</i>, I L R 31 All 443 distinguished. <i>SHYONANDAN LAL v ZAINAL ABDIN</i> (1914) I L R 42 Cal.	849
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ss 298 (1) () 357: See PARDON	856	Declaration of Paris: See CONFISCATION	334
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ss 350 (1) 418 See PARDON	210		
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Dispute concerning land—If vide see not		Court below yet the grounds of	
recorded according to law but		appeal did not relate to those	
memorandum taken down and signed		findings but to the question	
by the Magistrate personally—		whether the Courts below had taken	
legality of final order—Criminal		the proper view of the legal rights	
Procedure Code (Act I of 1898)		of the appellants and whether	
ss 115, 358 (1) and (3) The		accordingly, the test which they	
provisions of the section (1) of		had applied in the question of the	
the provisions are mandatory		infringement of the appellants	
Subsection (3) applies only where evidence has		rights was the correct one. That	
been recorded in accordance with		was a pure question of law which	
subsection (2) but not personally		initially rested upon the inter-	
by the Magistrate. Where the		pretations of the law to the law	
Magistrate did not take down the		of the House of Lords in <i>Colls v</i>	
evidence himself it was taken		<i>the Home and Colonial Stores</i>	
down in his presence and hearing		[1904] A C 149 when considered	
as a matter of course, if		in connection with the later decision	
himself made a note of the same—		of the House of Lords in <i>Ill v</i>	
<i>Hell</i> that the provisions of s 358		<i>Kine</i> [1907] A C 1 held	
did not then compel him to		find that in <i>Colls Case</i> [1904]	
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134 per Garth C J and the rule in *Fitzhugh v Case* 3 Heble 242, that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear held in the present case so far as such evidence can now be expected to be forthcoming as to particular grants more than a century if the evidence was sufficient to show that the competent authority—the Government of India in right of the Crown—had actually granted to the appellants predeceasing in title or title with them so as in effect to grant a jalkar right of several miles in certain of the water of the ranges system in this suit held also that flowing a numerous body of domains in the Indian Court that it must be taken as decided in *Bhattacharya v Government* grants of a jalkar right can follow the title given to the enjoyment of his exclusive fishery so long as the waters of the river system within the upstream and downstream limits of his grant whether the Government owns the soil subject to such waters as being the land still held by or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment the whole series of decisions in Bengal on the subject from 1807 to 1900 reviewed and discussed The English common law admittedly does not apply to the nucleus of India yet the Indian Courts have in many respects followed the English law of waters, and their Lordships have given careful consideration to the arguments that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India, though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing exclusive and important rights such

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as rights of jalkar, and unless they could be shown to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them The analogous rule in the United Kingdom connecting the the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil, is the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal, where above all the difference, indeed the contrast of physical conditions is capital By no analogy can rules applicable to the small slow running and comparatively unchanging rivers of England be profitably applied to such differing conditions In the case of alluvium as applied to rights of jalkar and the argument that the right to follow the river ought to be limited to cases where the river encroachments were gradual and should not be extended to an irruption as sudden and rapid as was the formation of the new channel in the respondents' lands, the Indian law, doubtless guided by local physical conditions has adopted in Regulation VI of 1875, sections 1 and 4, a rule varying somewhat from the rule established in England and the analogy of the

rule on the same subject. As to the Indian rule working injustice in that a landowner not only loses the use of his land when the river overflows it but also the right to fish over his own acres in order that another may unrighteously fish in his place, which cannot occur under the English rule there is no such proof that one rule is better than the other as would even approach the conclusion that the rule established in India should be

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recent encroachment. The whole series of decisions in Bengal on the subject from 1807 to 1900 reviewed and discussed. The English common law admittedly does not apply to the material of India yet the Indian Courts have in many respects followed the English law of waters, and their Lordships have given careful consideration to the arguments that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India, though they would in any case be slow to disturb customs which rules have been established for Bengal governing exclusive and important rights such

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India), that the part taken by the reversioners with respect to the mortgages in question did not, under the circumstances, amount to a consent to bind their interests. When a "stringent equity" arising out of an alleged consent by reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony such as appeared to have been relied upon in this case. *Jeeva Singh v. Misra* I L R 18 All 146, L R 23 I A 1 per Lord Hothhouse referred to *HARI KISHOR BUA AT v. KASHI PERSHAD SINGH* (1914) I L R 42 Cal.

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—Custom—*Babuna and Sohag grants*—Proof of Custom—Custom excluding females from succession in *Darbhanga Raj family estate*—Custom of exclusion not only from succession to Raj but extending to succession in collateral branches of family—Custom effective notwithstanding partition had taken place in family branch. In a suit by one of two brothers in a junior branch of the family of the *Darbhanga Raj* (an estate governed by the rule of male local primogeniture) against the widow of the other brother for possession of her deceased husband's property on the ground that widows were by the custom of the family wholly excluded from succession, not only to the Raj itself, but also in the

to which the parties belonged that widows did not inherit *babuna* properties and that the succession in the case of *sohag* grants was

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governed by the same custom as governed the succession in the case of *babuna* grants. The custom applied in this case notwithstanding a separation and partition of the property which had been effected between the plaintiff and his brother, and consequently on his brother's death the plaintiff became entitled to such of the estate of his deceased brother as consisted of *babuna* and *sohag* properties, together with accretions which had been made to the former property. Held, also, that the custom was strongly supported by instances in the family of widows, who would otherwise have been entitled to a Hindu widow's interest having been excluded from, or not having claimed, possession of property on the death of the husband, and that the custom being proved to be well established could not under the circumstances be defeated by the fact that in one instance, as the evidence showed, it was not enforced. Words used in the *babuna* and *sohag* grants "*auras putrapoutadi*," were held not to be words of general inheritance which would include female as well as male heirs but words of limitation consistent with the custom which excluded females from succession under *babuna* and *sohag* grants which could not be made under the ordinary Hindu (in this case the *Mithila*) law. *Ram Lal Woolryes v. Secretary of State for India*, I L R 7 Cal 304, L R 8 I A 46. *EKRADISHWAR SINGH v. JANESHWARI BANUASIV* (1914) I L R 42 Cal.

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—Inheritance—Right of bandhus to inherit—*Bhunnahotra sapindas*—Paternal grandfather's son's son's daughter's sons—Limitation of *sapinda* relationship—Same limitation, namely, 7 degrees on father's side and 5 degrees on mother's side in respect of marriage, affinity, impurity and unequal rites

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and in cases of inheritance—*Mitakshara*, Ch II ss 5 and 6. The Hindu Law contains its own principles of exposition and questions arising under it cannot be determined on abstract reasoning, or on analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law givers and recognised exponents. The word *bandhu* has in the system of the *Mitakshara* a distinctive and technical meaning in the words it signifies a *bandhu* *pitra sapinda*. The appellants as being the paternal grandfather, son, son's daughter, daughter's sons of a deceased Hindu, claimed to succeed to his property as his next of kin or *bandhus* under the *Mitakshara* Law. The respondents contended that the appellants had no heritable right in the property as they did not come within the category of *bandhus* entitled to succeed. *Hell*, (a) that the *sapinda* relationship on which the heritable right of collaterals is founded ceases in the case of the *bandhu* *tra sapinda* with the fifth degree from the common ancestor and (b) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are *sapindas* of each other. The appellants, therefore, being sixth in descent from the common ancestor, and there being no *sapinda* relationship between them and the propositus, they came within neither (a) nor (b) and were not entitled to inherit. The decision in the case of *Greedharae Lal Roy v Government of Bengal*, 12 Moo I A 448, does not warrant the contention that the three classes of *bandhus*, namely, *atma bandhus*, *pitra bandhus* and *matra bandhus* into which *Vijnaneswara* divides the *bandhus* in the *Mitakshara*, can be added to or extended

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The limitation of *sapinda* relationship laid down in the *Mitakshara* (*Acharya Kanda*) is, that it ceases after the 7th ancestor on the father's side and the 5th ancestor on the mother's side, is not confined to prohibition in respect of marriage, impurity, and excommunication only, but applies also to inheritance. *Lallubhai Hanburkar*, I L R 2 Bom 388, per Westropp C J, *Imad Bahadur Velos Chand*, I L R 6 Cal 119, and *Babu Lal Nanku Ram*, I L R 226 Cal 349 referred to. The value of the statement by *Sri Sri Golap Chandra Sarkar* in his work on Hindu law that "the word '*bandhu*' in the *Mitakshara* means and includes all cognate relations without any restriction or at any rate all cognates within 7 degrees on both the father's as well as the mother's side" is considerably discounted by his desire, in order to prevent the deceased's property becoming, so to speak, derelict, and thus excluding the

does not seem to be supported by the definition of *sapinda* relationship in the *Mitakshara* itself. The argument that the application of the *sapinda* relation in the case of *bandhus* should be extended beyond the 5th degree on the ground that it is not likely that *Vijnaneswara* would give a right of inheritance to a spiritual preceptor or *guru* before himself, however remotely connected, ignores the peculiar and intimate relationship which exists in the Hindu system between the pupil and the *guru* who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass so many years of his life, in which circumstances the mystical relationship between a spiritual preceptor and his pupil might well be regarded

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is creating a far closer tie than remote relationship of blood *RAM CHANDRA MAITRA v. WAHIA & VINAYAK VENKATASH KOTHEKAR* (1914) I L R 42 C Lc .

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—**Succession to**
Impartial—Little governed by rule of primogeniture where custom excluding females exists—*Holmes v. Holder* 10 C 100 (1881) 1 M L J 100
 —*Exclusion of separation*—joint family—Junior members leaving family h 100 and living in separate residence after obtaining grant for maintenance. The successor on the death of a holder without male issue is an impartial estate which descends fully to the male primogeniture the junior members of the family being entitled to grant for maintenance and where no grant is excluding females entitled dependent on whether there has been a separation between two brothers, the father and predecessor in title of the deceased holder and the father of the next contingent survivor. On that question the Courts in India differed. The Subordinate Judge finding that a separation had taken place and the High Court being of opinion that what had occurred did not in intention and fact amount to a complete separation. *Held* (reversing the decision of the High Court) that the evidence clearly proved that there had been a complete separation and that the widow of the last holder was therefore entitled to succeed to the estate for a Hindu widow's interest in priority to the next male reversioner. *LARA KUMAR & CHATURBHUS VARMA v. SINGH* (1915) I L R 42 Calc .

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—**Mortgage—Mortgage**—Mortgage by father to secure personal debt—Neither antecedent nor for family purposes nor immoral—Suit brought after his death—Limitation—Limitation Act (11 of 1877) Sec 12, Arts 120 132—*Transfer of Property Act* (11 of 1882) s 85, *Civil Procedure*

Hindu Law—contd

Code (Act V of 1908) O XXXIV, r 1 The Full Bench decision in the case of *Luchman Dasa v. Giridhar Chaudhary* I L R 5 Calc 855 is still binding on this Court as no contrary rule has yet been laid down by the Judicial Committee of the Privy Council [either in *Nanoms Babu v. Modhan Mohan*, I L R 13 Calc 21, I L R 13 I A 1 or *Bhajnath Pershad v. Ganga Kher*, I L R 15 Calc 717, I L R 15 I A 99] nor has it been superseded by subsequent legislation as s 85 of the *Transfer of Property Act* (now replaced by O XXXIV, r 1 of the *Civil Procedure Code*, 1908) cannot touch the question. Where a suit upon a mortgage effected by a father covered by the Mitakshara Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral had been brought (more than six years) after the death of the father, and the sons some of whom were adult and some minors at the time of the mortgage—*Held* (without deciding when the right to sue accrues) that Art 132 of the Schedule to the Indian Limitation Act had no application as there was no charge on immovable property enforceable against the sons consequently, Art 120 governed the case. *Luchman Dasa v. Giridhar Chaudhary*, I L R 5 Calc 855, affirmed. *Kishan Pershad Choudhary v. Tipani Peshad Singh*, I L R 34 Calc 735 approved. *Vahgarwar Dutt Tewari v. Kishan Singh*, I L R 34 Calc 184, *Biswanath Pershad Varana v. Jagdish Varan Singh* I L R 40 Calc 342, 17 C W N 1025, *Saket Varan Ray v. Mohshada Das Maitra*, 17 C W N 1022, overruled. *BRUNANDAN SINGH & BIDYA PRASAD SINGH* (1915) I L R 42 Calc .

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Hindu Law—contd

Religious endowments—
Shrēṣṭha—Nature of *debutter* grants where grantee is to enjoy properties from generation to generation on performance of *sheba* of the goddess—Permanent leases to grantee *calidity* of—*Civil Procedure Code* (1st of 1908) s 99—**Ambiguity—**
Evidence In the construction of ancient grants and deeds evidence is admissible as to the manner in which the thing granted has always been possessed and used for so the parties thereto must be supposed to have intended *Held v Hornby*, 7 La 197 8 R P 608 *Fer v Orbourne*, 1 East 32 followed The Court may call in aid acts under the deed as a clue to the intention *Doe v Rie* 8 Bing 981 followed This principle does not apply unless there is an ambiguity *Attorney General v The Corporation of Rochester* 5 De G M & G 882 followed Consequently while in a case of ambiguity the Court will uphold that construction of a deed which justifies a long usage as to the application of trust funds the Court will not where there is no ambiguity accept an erroneous interpretation though consistent with usage so as to sanction a manifest breach of trust *Drummond v Attorney General* 2 H L C 837 followed If there is a deed which says according to its true construction one thing you cannot say that the deed means something else merely because the parties have gone on for a long time so understanding it *Sadler v Biggs*, 4 H L C 435 followed Where two ancient *debutter* grants by one of the *Maharajas* of Pich were held to be ambiguous, the properties having been given to the grantee who was to enjoy them from generation to generation on performance of the *sheba* of the goddess, and in 1829 the successors of the grantee gave two permanent leases to the predecessors in in

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Hindu Law—contd

trust of the plaintiffs *Held*, that in those circumstances the Court might determine the true character of the endowment from the manner in which the dedicated properties had been held and enjoyed That the properties in dispute were not absolute *debutter* properties of the goddess, but were the personal properties of the grantee subject to the charge of the worship of the goddess *Ganga v Bimlaban*, 11 W R 142 *Malan v Kamal*, 8 W R 42 referred to That the permanent leases had become indefeasible by lapse of time *Jagamba Goswami v Ram Chandra Goswami* 1 L R 31 Cal 314, *Damodar Das v Lakhan Das*, 1 L R 37 Cal 885, 1 L R 37 I A. 147 as explained in the case of *Madhu Sudan Mandal v Radhika Prasad Das* 16 C L J 349 followed *KULADA PROHADA GHOSHIA v KALI DAS NAIR* (1914) 11 R 42 Calc ...

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Will—Construction of will—
Devise to widow—Gift or—
Life interest—Absolute gift—Power of appointment—Alienation by gift or sale—Administration suit—
Cause of action— A Hindu testator by his will provided for the performance of certain religious ceremonies and devised all his movable and immovable properties to his wife with power to alienate by gift or sale He also by the same will made a gift over to his daughter in the following terms—
 'My daughter Hara Kumari, shall become entitled to and enjoy a share of whatever property will remain after your death and she shall enjoy the same keeping up and maintaining the *sheba* etc' The will then went on to say—
 'the said daughter shall

perform the same and keeping up the same and keeping up the same

Hindu Law—contd

ing, the *sheba* enjoy them. At his death on the 11th March 1866 the testator left him surviving his widow and an only daughter, Hara Kumari. The widow having obtained probate of the testator's will executed on the 19th May 1898 in

a deed of gift of certain properties acquired by her under the said will. On the 30th September 1898 the widow died. In October 1899 Mahim Chandra Sarkar the testator's nephew, disposed of Hemangini and Nagendrabala of these properties and took possession of the same. On the 8th March 1908 Hara Kumari in whose favour the High Court had decided a suit brought by Mahim Chandra Sarkar for the construction of the testator's will and for a declaration of the rights of the parties thereunder (11 C W N 412 7 C L J 540) executed a deed of gift in favour of her daughter Hemangini and on the 8th April 1908 she also executed a similar deed in favour of her other daughter Nagendrabala and a Lobala in favour of Hemangini. In suits brought for administration by Mahim Chandra Sarkar against Hara Kumari who died during its pendency, for recovery of arrears of rent and cesses in respect of a certain *daryatni* belonging to the estate of the testator by Mahim Chandra Sarkar against the *daryatni* and Hemangini and Nagendrabala and for recovery of possession of certain property acquired by virtue of the deed of gift from the testator's widow by Hemangini and Nagendrabala against Mahim Chandra Sarkar. *Held* that Mahim Chandra Sarkar had no cause of action and could not maintain the suit for administration. *Held*, also, that the testator could make an absolute gift to his daughter who

Hindu Law—contd

was his reversionary heir in absolute estate and that the gift to her under her father's will was an absolute gift. *Held* also, that there was no power of appointment to the daughter enjoining her to nominate an heir or successor to her father's estate. *Held* also, that the provision for keeping up the *sheba* was merely a collateral charge on the property in whose ever's hands it might be and did not affect on the absolute character of the gift. *Brig Lal v Suraj Bikram Singh*, 1 L R 34 All 405 distinguished. *Houlie v Mahomed Shamsul Hooda v Sheikurram*, L R 2 I A 7, *Radha Prasad Mullick v Ramesoni Das*, 1 L R 35 Cal 896 L R 35 I A 118, *Jatindra Mohan Tagore v Ganendra Mohan Tagore* 9 B L R 377, *Ussamat Kollany Koor v Luchnee Pershad* 24 W R 395, *Thakur Singh v Nohhe Singh* 1 L R 23 All 309 and *Ranasami v Papayya* 1 L R 16 Mad 466, referred to. *Held*, also, that the *patni* was vested in Hemangini and Nagendrabala by alienation during Hara Kumari's life that they were Hara Kumari's heirs the property being *stridhan* and that Mahim Chandra Sarkar had no title whatever to any of the properties left by Hara Kumari. *Held*, also, that the widow had absolute power of alienation in derogation of the rights of the sole reversioner her daughter who was only entitled to the residue, that the gift by the widow to Hemangini and Nagendrabala was valid and that Mahim Chandra Sarkar could not plead his right as reversioner against a suit by the heirs of Hara Kumari to eject him as a trespasser, even though the gift should fail. *Hara Kumari Das v Mahim Chandra Sarkar*, 12 C W N. 412, 7 C L J 540 referred to. *Held*, further, that the power of alienation which though perhaps analogous to what

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Hindu Law—concl'd		Homestead Land—concl'd	
was known as a power of appointment in English law & will not be governed by the rules of English law relating to such appointments <i>Bai Waturaku v Bai Mamulai</i> I L R 21 B m 709 referred to <i>MARIM CHANIRA SARKAR v HARA KUMARI DASSETI</i> (1914) I L R 42 Calcutta	511	17 C W N 984, followed and explained The facts that the purchaser demanded rents from the tenants to the knowledge of the under tenure holder, sued the tenants for rent took out warrants of attachment in execution of decrees and realized rents from the tenants in repudiation of the under tenure holder's title, go to show that the under tenure holder had not only notice of unequivocal acts on the part of the purchaser indicating his election to avoid the <i>molarra</i> but the purchaser had in fact obtained possession of the estate <i>Mir Waziruddin v Deok Anan</i> 6 C L J 472, distinguished <i>Per N R CHATTERJEE J</i> The mere fact that a garden was made on a piece of land a quarter of a century before the sale, would not make it land on which a garden has been made for all time to come <i>Per BEACHCROFT, J</i> No particular method of express	
Hindu Widow : See GUARDIAN	953		
Homestead Land—Suit for rent—Jurisdiction—Protected under tenure—Revenue Sale Act (XI of 1859) s 37 cl (4)—Garden—Incumbrances annulment of on sale of taluk for arrears of revenue—Provincial Small Cause Courts Act (IX of 1887) Sch II Art 8—Second appeal—Civil Procedure Code (Act V of 1908) s 102 Section 102 of the Civil Procedure Code is no bar to second appeals in suits for rent other than house rent although the value thereof does not exceed Rs 500 vide Art 8 of Schedule II of the Provincial Small Cause Courts Act <i>Sourdaram Ayyar v Sennia Natchan</i> I L R 23 Mad 547, distinguished When land ceased to be garden land about a quarter of a century ago and tenants have been settled on the land since then, the tenure is not protected and does not fall within the 4th exception to section 37 of the Revenue Sale Act (XI of 1859) and is liable to be annulled The effect of a sale is not <i>ipso facto</i> to avoid under tenures, the purchaser has the option of avoiding them or keeping them intact <i>Titu Bibi v Mohesh Chandra Bagchi</i>, I L R 9 Calcutta 683, followed It is necessary, therefore, that the purchaser must by some unequivocal act indicate his intention to avoid under tenures if he desires to do so and the election of the purchaser to avoid must be brought to the knowledge of the under tenure holder A formal written notice is not essential, <i>Dursan Singh v Bhawanji Koer</i>,		that intention to the under tenure holder To afford protection the work must still be in existence or the land be used for the purpose of the work The perfect tenure in "leaves of land whereon gardens have been made" denotes a present state <i>Obiter</i> If the <i>busti</i> land is covered by the lease of the land on which the mill stands or if the <i>busti</i> is an integral part of the mill, and exists only for the purposes of the mill it is possible that it might be protected <i>SANADORA MUDIAIT v NABIN CHAND BORA</i> (1914) I L R 12 Calcutta	
		Identity of Transaction : See MISJOINER OF CHARGES	...
		Umal Shara : See SALE FOR ARREARS OF REVENUE	...
		Illegal Composition : See UNDE INFLUENCE	...

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tax—Collector jurisdiction of, to	
assess income tax—Income Tax Act	
(II of 1886)—Contract Act (IX of	
1872) s 72 : Income accruing to	
an executor under the will of a	
testator is 'income' as defined in	
a 3, clause (5) of the Income Tax	
Act, 1886, and is liable to be taxed	
under the Act. It is the Collector's	
duty to determine what persons are	
chargeable in respect of sources of	
income other than salaries and	
pensions profits of companies and	
interest on securities. A suit	
brought by an executor of an estate	
for a declaration that as executor he	
was not liable to pay income tax	
in respect of any income of the	
estate and that the collector, in	
realising the sums paid to him,	
acted without jurisdiction and for	
a decree for the amount so paid	
with interest does not lie. Pay-	
ment of income tax by the execu-	
tor of an estate, under protest, on	
the ground that as executor no tax	
was payable by him, may be regard-	
ed as paid under coercion within	
the meaning of s 72 of the Con-	
tract Act <i>Kanhaya Lal v National</i>	
<i>Bank of India Ltd</i> 1 L R 40	
Calc 598 L R 40 I A 56, refer-	
red to <i>FORDEN : SECRETARY OF</i>	
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lies for damages against a delin-	
quent for, maliciously and without	
reasonable or probable cause, obtain-	
ing a perpetual injunction which	
was subsequently dissolved on	
appeal <i>Nand Coomar Shah v</i>	
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ed <i>Quartz Hill Mining Co. v</i>	
<i>Fyre</i> , 11 Q B D 690, <i>Smith v.</i>	
<i>Day</i> , 21 Ch. D 421, <i>Hari Nath</i>	
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R 20 I A 188, <i>Chander Cant</i>	
<i>Mookerjee v Ram Coomar Coondoo</i> ,	
22 W. R 138, <i>Collierell v Jones</i>	
11 C B. 713, <i>Turner v. Ambler</i> , 10	
Q B 252, referred to Under Art	
42 Sch I of the Limitation Act	
(IX of 1908) time begins to run	
from the date when the injunction	
ceases <i>MOHINI MOHAN MISHRA v.</i>	
<i>SURENDRA NARAIAN SINGH</i> (1914)	
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Attachment under mortgage	
decree and order for sale of mort-	
gaged property—Vesting order under	
s 7 of Insolvency Act (II of 12 Vict,	
s 21), effect of—Sale after vesting	
order—Sale by Official Assignee to	
plaintiff—Title of purchaser from	
Official Assignee as against judg-	
ment creditor purchasing at sale in	
execution of his own decree—Notice	
An attachment in execution of a	
money decree on a mortgage of land,	
followed by an order for sale of	
the interest of the judgment debtor	
does not create any charge on the	
land <i>Sarkies v. Bundoo Bacc</i> , 1	
N W. P. 172, referred to An	
attachment prevents and avoids any	
private alienation, but does not	

Insolvency—*contd*

invalidate an alienation by operation of law such as is effected by a vesting order under the Indian Insolvency Act (11 & 12 Vict. c. 21) and an order for sale though it binds the parties does not confer title. Previous to the 8th September 1904 a colliery leased to the judgment debtors was attached under a mortgage decree by the respondents (judgment creditors) and an order for sale on 5th September was made but at the request of the judgment debtors the sale was postponed until the 10th. On 8th September the judgment debtors filed their petition in the Insolvency Court in Calcutta and the usual vesting order was made on the same day. On 12th September the execution proceedings were stayed. After issue of notice on the application of the respondents to the Official Assignee to show cause why he should not be substituted in the place of the judgment debtors the Subordinate Judge on 10th January 1905 finding that the notice had been duly served made the order for substitution and fixed the sale for 6th March 1905 on which day the property was sold and purchased by the respondents who in June were put into possession. Meanwhile on 23rd May 1905 the Official Assignee with leave from the Insolvency Court in March 1908 sold the property to a purchaser, who on 24th June 1908 sold it to the plaintiffs by whom on 16th July 1908 the

Assignee to show cause why he should not be substituted for the judgment debtors was not a proper notice under section 248 of the Civil Procedure Code, 1882. A notice under that section should have called on him to show cause why the decree should not be

Insolvency—*contd*

executed against him. But assuming the notice to have been duly served (which was denied) the sale

wrong, to allow the sale to proceed at all. The judgment creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place, no proper steps had been taken to bring the Official Assignee before the Court

debtors had, at the time of the sale, no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property. *Mallargun v. Narhars*, 1 L R 25 Bom 337, L R 27 I A 216 distinguished. No proper notice was served under section 248 of the Civil Procedure Code, and the respondents had full notice, and were responsible for the irregularities of the procedure adopted. *RAGHUNATH DAS & SUNDAR DAS KHETRI* (1914) 1 L R 42 Calcutta.

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Interim Receiver—Insolvent's money, attachment of, before the adjudication order—Provincial Insolvency Act (III of 1907) s. 13, cl (2) s. 16, cl (6) s. 34, cl (1)—Bankruptcy Act of 1883 (40 & 41 Vict. c. 52), s. 40. An interim receiver is appointed for the protection of the estate of the debtor for the benefit of the entire body of creditors. Ex parte Fox, L. R. 17 Q B D 4, referred to. Clause (1) of s. 34 of the Provincial Insolvency Act restricts the operation of s. 16 clause (6) thereof. A creditor, who had attached a sum of money due to the insolvent before his estate vested in the receiver appointed after the adjudication

Insolvency—concl'd

order, is entitled to apply it exclusively in satisfaction of his debt
MADHU SARDAR v KHITISH CHAV
DRA BANEEJEE (1914) I L R 42
Calc 289

Practice—Presidency Towns

Insolvency Act (III of 1909) s 36
(4) (5) whether applicable to
contentious matters Section 36 (4)
and (5) of the Presidency Towns
Insolvency Act 1909 is intended
to provide a summary procedure
for ordering payment of debts due
and delivery of property belonging
to an insolvent, where there is no
dispute it is not intended for
contentious matters or for follow
ing property the subject of fraudu
lent preference or dishonest con
cealment In re J M LUCAS AND
ANOTHER (1914) I L R 12 Calc 109

Insolvency Act (11 & 12 Vict s 21) s 7
See INSOLVENCY 72

Insolvency of Partner See MINOR 225

Intangible Property See PALAS OR
TURNS OF WORSHIP 455

Interest See MORTGAGE 114

Interest Ss DIAFREY BOND 742

Contract Act (IX of 1872),

s 10, 71—Undue influence pre
sumption (f)—Penalty—Excessive
and usurious interest—Duty of the
Court Where there is ample
security, the exaction of excessive
and usurious interest in itself raises
a presumption of undue influence
which it requires very little evi
dence to substantiate The
attempt to conceal the real rate of
interest, by describing it as one
pice in the rupee per mensem or
as in the present case, Rs 5 per
mensem is evidence of an inten
tion to get the better of the debtor
The law lays down that there must
be a footing of complete equality
between debtor and creditor and
they must be so to speak, at arm's
length to make a bargain, which is
in itself harsh and unconscionable
enforceable at law Carringtons, Ltd

Interest—concl'd

v Smith [1906] I K B 79, In re a
Debtor [1903] 1 K B 705,
referred to Where there is ample
security, an excessive rate of
interest has been held to be any
thing over ten per cent. Where
there is no security, no rate of
interest can be considered exce
sive There can be no standard
rate on per cent loans, and where
the parties are reasonably on terms
of equality, a Judge cannot do
better than adopt what they them
selves have agreed on though of
course, when that is not the case
he has to judge what is reasonable,
as best he can and under all the
circumstances Where the contract
is for a temporary accommodation,
the stipulation that interest is to
run at Rs 5 a month is one which
necessitates the payment of interest
not at 60 per cent per annum, but
at Rs 5 in each month and a stipu
lation that in default of 12 months'
instalments of interest, compound
interest would begin to run is in the
nature of a penalty However tech
nical this may be it is the duty of
the Courts in India to enforce the
letter of the law against obviously
harsh and unconscionable bargains
of this nature The exploitation of
the necessities, of the careless and
inexperienced, is a trade to be extir
pated in the interest of the whole

lingam Pillai I L R 36 Mad 229,
Samuel v Newbold [1906] A O
461, Kesavulu Nallu v, Arithula,
Ammal I L R 36 Mad 533
referred to ABDUL WAJED v
KHIERODD CHANDRA PAL (1914)
I L R 42 Calc 690

Interest—Stipulation in mortgage bond
or interest at 75 per cent per
annum whether penalty—Liquidated
damages—Undue Influence—Uncon
scionable bargain—Contract Act (IX
of 1872) ss 10, 71, illus (f) as
amended by Act VI of 1899, s 4

Interest—contd

Interest—contd

(1)—*Act XXXIII of 1855, s 2*
Per Mookerjee J (Becheroff J
 agreeing to as to penalty) Not
 withstanding the small group of
 cases where a restricted view was
 taken of the authority of the Court
 to relieve against a penalty the
 tide has turned back and the more
 modern cases repudiate the doctrine
 that any rate of interest however
 exorbitant, cannot be deemed penal
Motoji v Sheikh Hussain 6 Bom
 H C 8 Para v *Govind* 10 Bom
 H C 32 followed *Arjan Bili v*
Asyar Ali 1 I R 13 Cal 200
Gokul Chandra Ajaia Ali (1890)
 Punj Rec 32 *Sankaranarayana*
Idhyar v Sankaranarayana
Ayyar, 1 L R 25 Mad 343
Chinna v Peida, 1 L R 26 Mad
 445 *Periaswami v Subramanian*
 14 Mad L J 146 not followed
 This principle is fairly deducible
 from the modern decisions that
 the Court is competent to grant
 relief whenever the rate of interest
 appears to the Court to be penal
Mayan Patari v Abdul Subbar, 10
 C W N 1020 *Ichchand v Flagg*
 1 L R 36 Bom 164 14 Bom L
 R 18 *Ganapathi v Sundara* 22
 Mad L J 354 *Muthukrishna v*
Sankaralingam 1 L R 36 Mad
 229 followed Although s 74 of
 the Contract Act was originally
 framed to deal with the doctrine of
 penalty and liquidated damages as
 understood in the law of England
 it is in its present form compre-
 hensive enough to include the type
 of cases before the Court, because
 it covers all cases where the con-
 tract contains 'any stipulation by
 way of penalty' It is obvious
 that each case must be treated on
 its own circumstances The test is,
 was the agreement to pay damages
 for the breach of contract uncon-
 scionable and extravagant such as
 no Court ought to allow to be
 entered into *Webster v Bosanquet*
 [1912] A C 394, referred
 to "You are to consider whether

it is extravagant, exorbitant, or
 unconscionable at the time when the

plation of the parties when they
 made the contract" *Clydebank*
Engineering Co v Don Jose
Castaneda [1905] A C 6 referred
 to A stipulation for merely
 acceleration, payment of the whole
 debt in default of payment of one
 or more instalments is not by
 itself, by way of penalty *Ex*
parte Burden, 16 On D 675,
Sterne v Becl, 1 D.G J & S 695
Wallingsford v Mutual Society, 5
 App Cas 685 referred to But
 when the entire sum which the
 creditor had agreed to receive in
 instalments without interest, is not
 only repayable in one sum, but is
 also made to carry interest at an
 unusual rate, the Court may, in
 view of all the circumstances of
 the case, regard the stipulation for
 payment of interest at an exor-
 bitant rate as penalty When (on an
 account originally made up very
 largely of interest at an exorbi-
 tant rate) the stipulation was made
 in the mortgage bond (no interest
 being payable up to due date) that
 upon default of payment of one
 or two instalments not only would
 the whole balance due become
 forthwith payable, but would carry
 interest at the rate of 75 per cent
 per annum *Held*, that the cove-
 nant for payment of interest at
 this rate was a penalty, i.e., it did
 not represent the damages which
 the creditors were likely to suffer
 by reason of the default of the
 debtors, but was rather intended as
 an effective means to secure punc-
 tual performance of the contract.
Per Mookerjee J. Where the facts
 make it clear that the creditors
 were in a position to take advan-
 tage of the embarrassment of their
 debtors and the bargain they made

Interest—*conold*

was unconscionable there is a concurrence of the two elements which must combine to attract the operation of s 16 of the Contract Act *Davis v Young Shree Goh* I L R 38 Calc 805 L R 38 I A 155 *Ketavulu Naidu v Arithulal Iyral* I L R 36 Mad 573 followed *KHACIPAN DAS v RAMANAR DAS PRAMANIK* (1914) I L R 42 Calc 652

Interim Receiver. See INSOLVENCY 28J

Interlocutory Order. See JURISDICTION 926

Irregularity. See STATE FOR APPEALS OF REVENUE 765

Jaigir *Sanal* construction of—Tenure created by document—Custom—Life estate—Use of the words *putra putradi*—Absolute and heritable estate—Regulation XVIII of 1793 s 13 A grant of a *jaigir* is a grant for life only but in the absence of any custom to the contrary the addition of the words '*putra putradi*' in the grant implies an absolute and heritable estate and passes an estate of inheritance. Under a *sanal patia* the ancestor of the plaintiff granted a *jaigir* in the district of Hazari to the grantee and his *putra putradi*. On the death of the grantee and of his sons without an heir, the plaintiff finding that the tenants of the *jaigir* stopped paying him the rents brought a suit for redemption of the *jaigir* on the ground that according to custom the grant was a service grant revocable by the grantor and his representatives on failure of male issue in the line of the grantee and of his male descendants. On appeal to the High Court—*Held* that the original grantee took an absolute heritable and alienable estate and that all his heirs were capable of inheriting it. *Rimal Moolerjee v The Secretary of State for India* I I L 7 Cal 394 L R 8 I A 46 followed *Gulab*

Jaigir—conold

das Juggurandas v The Collector of Surat I L R 3 Bom 186, L R 6 I A 54, *Bhujanga Rau v Ramayamma*, I L R 7 Mad 387, and *Lalit Mohun Singh Roy v Chuklun Lal Roy* I L R 24 Calc 834 L R 24 I A 76, referred to *Perkash Lal v Ramesh Chandra Nath Singh*, I L R 31 Calc 561, and *Roopmath Honneur v Juggunnath Sahce Deo G v D A Sel Rep* 158, distinguished *RAM SARAY LALL v RAM NARAYAN SINGH* (1914) I L R 42 Calc 305

Jaikar, right of. See FISHERY 489

Joint Trial. See MISHANDER OF CHARGES 1153

Judgment Creditor. See INSOLVENCY 72

Judicial Enquiry. See SUFFY 706

Jurisdiction. See FORFEITURE 730

See HOMESTEAD LAND 688

See SANCTION FOR PROSECUTION 667

Proceedings under s 11

Civil Procedure Code—High Court's Jurisdiction to interfere with interlocutory orders—Civil Procedure Code (Act V of 1908) s 10—Charter Act (21 & 25 Vict c 105) s 15 The jurisdiction of a Court in a proceeding under s 10 of the Code of Civil Procedure is limited to stopping a new suit if the circumstances mentioned in that section are conditions precedent to the passing of the order be found by the Court to exist. Courts have no jurisdiction to decide the question of *res judicata* in such a proceeding. Where a Court has jurisdiction to pass an order but it has been exercised in violation of the provisions of the law and under a misapprehension of the questions at issue, the Court must be held to have acted with material irregularity in the exercise of its jurisdiction. *Yenklubai v Lakshman Yenkluba Khot* I I L R 12 Bom 617, *Sen Bax Bogla v Shub Chunder Sen* I L R 13 Calc 225, *Jugobundhu*

Jurisdiction—contd

Puttuck v Jatu Ghose 1 L R 15
Calc 47, Tarini Charan Banerjee v
Chandra Kumar Dey 14 C W N
 788, referred to The High Court
 is entitled to interfere under s 15
 of the Charter Act if not under
 s 115 of the Code with interlocu-
 tory orders, when they might lead
 to failure of justice or irreparable
 injury. *Dhapa v Ram Pershad*
 1 L R 14 Calc 768 *Gubinda*
Mohan Das v Kunja Behari Das
 14 C W N 147 and *Amjal Ali v*
Ali Hussain Johar 15 C W N
 353 referred to SIVAJIRAM RAY
 v TRICONDAS COVERJI BHOJA (1915)
 1 L R 42 Calc

926

Suit for land or other
 immovable property construction
 of—*Letters Patent* 1865 cl 12—
Trespass—Compensation for wrong
to land—Wrongful cutting and re-
moval of coal—Civil Procedure Code
(Act I of 1908) s 16—Civil Pro-
cedure Code (Act I of 1859) s 5
 —*Venue* The expression suits
 for land or other immovable pro-
 perty in clause 12 of the Charter
 of 1865 cannot be construed as
 being limited to suits for the re-
 covery of land in its strict sense
 but must be construed as extend-
 ing to a suit for compensation for
 wrong to land where the substan-
 tial question is the right to the land
SUDAMINI COAL CO LD v EMPIRE
COAL CO LD (1915) 1 L R 42
 Calc

942

Suit to enforce mortgage of
 land partly in Sonthal Parganas
 and partly in local jurisdiction of
 Bhagalpur Court—*Jurisdiction of*
Bhagalpur Court—Sonthal Par-
gas Settlement Regulation (III of
1872), ss 5 and 6—Sonthal Par-
gas Act (XXVII of 1855) s 2
 —*Sonthal Parganas Justice Regu-*
lation (V of 1893) Part 2 and s 10—
Consent of parties to jurisdiction of
a Court—Tary provisions relating
to ss 2 Regulation III of 1872
 —*Question of Jurisdiction not taken*

Jurisdiction—contd

in High Court—Schedule I Districts
Act (VI of 1874) In a suit in
 the Court of the Subordinate Judge
 of Bhagalpur, to enforce a mort-
 gage bond for principal and interest
 amounting to over 5 lakhs of
 rupees by far the greater portion
 of the mortgaged property was
 situated in the Sonthal Parganas
 and the mortgagors resided in that
 district the rest of the property
 being situated within the local
 jurisdiction of the Bhagalpur Court.
 The mortgage bond was executed
 at Bhagalpur, and contained a
 stipulation that the mortgagees
 might enforce it in the Bhagalpur
 Court. The suit was instituted on
 20th June 1904. On an objection
 taken that the Bhagalpur Court had
 no jurisdiction to entertain the
 suit—*Held*, on an examination and
 consideration of the Acts and
 Regulations applicable to the Son-
 thal Parganas, that at the date the
 suit was commenced no suit would
 lie in any Court established under
 the Bengal Civil Courts Act (VI of
 1871) or under the Bengal, United
 Provinces, and Assam Civil Courts
 Act (XII of 1887) which has taken
 its place in regard to any land, or
 any interest in or arising out of
 land but such suits must have been
 brought before Settlement Officers,
 or in Courts of Officers appointed
 under section 2 of the Sonthal
 Parganas Act (XXVII of 1855),
 and the Sonthal Parganas Justice
 Regulation (V of 1893), Part 2, so
 long as the land had not been
 settled, and the settlement declared
 by a notification in the *Calcutta*
Gazette to have been completed and
 concluded. And, it being found
 that the land included in the mort-
 gage in suit had not been wholly
 settled the suit came within the
 provisions of s 5 of the Sonthal
 Parganas Settlement Regulation
 (III of 1872) and was excluded
 from the jurisdiction of any but the
 special officers or Courts appointed

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Jurisdiction—contd	Jurisdiction—contd
under s 2 of Act XXVII of 1855 and therefore the Bhagalpur Court not being one of the special Courts had no jurisdiction to try it. The stipulation in the mortgage bond to the effect that the mortgagees might enforce it in the Bhagalpur Court was of no effect. As the suit was one with regard to land in the Sonthal Parganas which the Bhagalpur Court had no jurisdiction to entertain the parties could not by consent give the necessary jurisdiction to the Court. To allow them to do so would be to nullify the express provisions of s 5 of Regulation III of 1872 which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of such jurisdiction. <i>Held</i> also that apart from the question of jurisdiction any Court dealing with the subject matter of the suit would be bound to give full force and effect to the provisions of s 6 of Regulation III of 1872 relating to usury and therefore to refuse to decree any compound interest arising from any intermediate adjustment of interest or a total amount of interest exceeding the principal of the original debt or loan. This provision of section 6 was not one of procedure but of substance and so far as the Court having jurisdiction within the Sonthal Parganas are concerned, it places all contractual stipulations as to compound interest in a position of non-enforceability and limits statutorily the total interest which can be decreed on a loan or debt. The question of jurisdiction which depended on no disputed facts was in issue in the suit and had been adjudicated upon in the first Court was one which their Lordships were of opinion they could not decline to entertain though not specifically raised on the appeal, especially as it necessarily presented itself in argument. <i>Semle</i> . The provisions of the	Jurisdiction—contd
	Scheduled Districts Act (XIV of 1874) have never been extended to the Sonthal Parganas. <i>MAHA PRASAD SINGH v. RAMAYI MOHAN SINGH</i> (1914) I L R 42 Calcutta 116
	Jury See PARDON 856
	Jury Trials See REFERENCE 789
	Kahkhat Temple. See PALAY OR TURNER OF MOORSHI 455
	King's Prerogative of Pardon See PRIVY COUNCIL PRACTICE OF 739
	Knowledge See PROBATE 480
	Land Acquisition Act (I of 1894) ss 18 30 See MORTGAGE 1146
	Land Acquisition Judge See MORTGAGE 1146
	Leading Questions: See CHARGE 957
	Leave to appeal to Privy Council—Application—Civil Procedure Code (Act V of 1908) s 110—Computation of time—Limitation Act I of 1908, s 12 whether ultra vires—Legislative powers of the Governor General in Council—Order in Council 1858—Government of India Act 1858 (21 & 22 Vict c 106) s 64—Indian Councils Act, 1861 (24 & 25 Vict s 67)—Letters Patent 1365 ss 39 & 44 Section 12 of the Limitation Act of 1908 applies to applications for leave to appeal to His Majesty in Council. Section 12, sub cl (2) which enacts that in computing the period of limitation prescribed for an application for leave to appeal the time requisite for obtaining a copy of the decree appealed from shall be excluded was within the legislative powers of the Governor General in Council not being in contravention of section 64 of the Government of India Act, 1858 and is not ultra vires <i>Eastern Mortgage and Agency Company Limited v. Purna Chandra Sarbhaga</i> I L R 39 Calcutta 510 <i>Jakshmanan v. Peryasami</i> I L R 10 Mad 373, <i>Anderson v. Periasami</i> I L R 15 Mad 169. In re <i>Sita Ram Keslo</i> , I L R 15 All

Leave to appeal to Privy Council—*concl'd*

14, <i>Thurai Rajah v. Jaimaldeen Routlan</i> , I L R 18 Mad 484	
<i>Urola Ramchandra v. Ghina sham Nallant Nadharni</i> , I L R 19 Bom 301, <i>Motichand v. Ganga Parshid Singh</i> , I L R 24 All 174; L. R. 29 I A 40 referred to	
ABDULLAH HOSSEIN CHOW DULFI = ADMINISTRATOR GENERAL OF BENGAL (1914) I L R 42 Cal.	35

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—Limitation Act (IX of 1908),

Sch I, Art. 124—(Act IV of 1877) Sch II, Art 121—Hereditary office of shebait—Successor of shebait when bound by decree against predecessor in shebaitship—Decree holder and purchaser at sale in execution who by reason of low caste is not competent to hold office of shebait—Adverse misappropriation of temple income by trespasser is competent to be shebait—Wrongful possession not constituting wrongful holder shebait—Res Judicata This was an appeal from the decision of the High Court in the case of <i>Jharula Das v. Jalandhar Thakur</i> ,	
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Limitation—*cont'd*

I L R 39 Cal 887, in which the widow of the shebait of a temple (the shebait of which were Brahmin Pandas) who succeeded her deceased husband in that office, mortgaged land together with her interest in the income of the temple to the defendant (who was not a Brahmin). The defendant obtained a decree on his mortgage on 24th September 1880 in execution of which he put up for sale the share of the temple income purchased at himself, and got delivery of possession in 1892. The widow died in May 1900. In a suit brought on 28th January 1910 for the land and mesne profits and for a declaration that the plaintiff was entitled to receive the share of the temple income as it was inalienable, the defence was that the suit, so far as it related to the temple income, was barred as being *res judicata*, and by limitation *Held* by the Judicial Committee (reversing the decision of the High Court) that Art 124 of the Limitation Act was not applicable. The suit was not one for an hereditary office which could not be held by a person who was not a Brahmin, and the defendant was therefore not competent to hold the office of shebait, and had not taken possession of it. By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, the defendant acquired no title, and no right to a share of that income. On each occasion on which he received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, the defendant committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait, but it did not constitute him the shebait for the time being or affect in any way the title to the office. *Held* also that the defence (which had been upheld by the

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Limitation—contd		Limitation—contd	
High Court that the suit was barred as res judicata by the decision in a former suit brought by the widow to set aside the gift of the temple income was not maintainable <i>JALANDHAR THAKUR v. JHARILA DAS</i> (1914) I I R 42 CALC	244	Sch I of the Limitation Act (IX of 1908) and is therefore barred if not made within the period prescribed by that article <i>MUNNA LAL PARRACK v. SARAT CHUNDER MUKERJI</i> (1914) I L R 42 CALC	776
Mortgage suit—Civil Procedure Code (Act I of 1908) O XXXI rr 3 and 6—Limitation Act (IX of 1908) Sch I Art 181—Transfer of Property Act (IV of 1882) s 50—Personal covenant		Limitation Act (XV of 1877) Sch II, Arts 120 132: See HINDU LAW—MORTGAGE	1008
The plaintiff in a mortgage suit who has his personal remedy at the date of the institution of the suit would not lose his personal right by reason of his not having made the application for personal decree under O XXXIV r 6 within the six years of the date of the confirmation of the mortgage decree such applications under O XXXIV r 6 are not governed by Art 181 of the Limitation Act any more than an application for order absolute under O XXXIV r 3 <i>Rahmat Karim v. Abdul Karim</i> I L R 34 Calc 672 and <i>Madhabram Das v. Pamela Lambert</i> 12 C L J 328 referred to <i>BISWAMOHAR SHARMA v. BAN SUNDER KHAIBARIA</i> (1914) I L R 41 Calc	294	Limitation Act (IX of 1908) s. 5 See APPEAL	433
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		Sch I Arts 29, 35 49 See ARREST OF SHIP	85
		Sch I Art 42 See INJUNCTION	550
		Sch I Art 124 See LIMITATION—SHEDAIT	214
		Arts 180 183 See LIMITATION	776
		Art 181 See LIMITATION	294
		Limited Company See PARTIAL LEASE	1029
		Liquidated Damages See INTEREST	602
		Magistrate duty of See COMMITMENT	608
Preliminary Mortgage decree—Limitation Act (IX of 1908) Sch I Arts 180 183—Application for sale of mortgaged property under decree—Transfer of Property Act (IV of 1882) ss 85 to 89—Civil Procedure Code (Act I of 1908) O XXXI rr 4, 5		Mahomedan Law—Gift made in lieu of dower—Nature of such gift	
In this case the majority of the Judicial Committee affirm the decision of the High Court in <i>Imlook Chandra Parrack v. Sarat Chandra Mukerjee</i> I I R 38 Calc 913 that an application for an order absolute for sale under a mortgage decree is an application to enforce a judgment or decree within the meaning of Art 183 of		The provisions of the Mahomedan Law applicable to gifts made by persons labouring under a fatal disease, do not apply to a so called gift made in lieu of a dower debt which is really of the nature of a sale <i>Ghulam Mustafa v. Hurmat</i> I L R 2 All 854 followed <i>Abbas Ali v. Karim Bakhsh</i> 13 C W N 160 and <i>Bibi Janbi v. Narath Saib</i> 21 Mad L J 958, referred to <i>ISAHAQ CHOWDHURY v. ABEDUN-NESSA BIBI</i> (1914) I L R 42 CALC	361
		Marriage—Minor—Custom for marriage functions and position of—Marriage of minor	

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ward, necessity of consent of Court
see—Functions of Court in such cases—Procedure to be followed by the guardian for Marriage of Mahomedan infant—Guardians and Wards Act (1 III of 1890), ss 4(2) 24, 25, 26, 41, subs (1), cl (d) 12 subs (1), 47 cl. (a)—Practice—Order of District Judge not appealable. In the case of Mahomedins the words 'disposal in marriage' cannot be treated as included in the general words "such other matters as the law to which the ward is subject requires" occurring in s 24 of the Guardians and Wards Act. In the absence of express statutory provision to this effect, it cannot reasonably be held that the Mahomedan law on the subject of guardianship in marriage has been abrogated by implication by s 24 of the Guardians and Wards Act. Where the District Judge of Birmahm, in the matter of the disposal in marriage of a Mahomedan female minor in respect of whose person and property guardians had been appointed by him proceeded to select a suitable husband for the minor from the preliminary list of possible candidates prepared by his Hindu Nazir (the guardian of the property) in opposition to the selection of the guardian of the person (her mother), and of the guardian for marriage (her father's step brother) both of whom had initiated these proceedings. *Held*, that the proceedings before the District Judge had been throughout irregular. It was not the function of the District Judge to act as matchmaker. But a ward of Court could not marry without the consent of the Court. *Eyre v Shaftesbury* 11 P Wms 103 *Jefferys v Vantes carstearth*, Barn Ch 141 *Fombes v Fiers* 1 Dick 88, *Subhadra Koer v Dhayrshari Goswami*, 15 C L J 147 followed *Bu Dials v Mota Karon* 1 L 11

Mahomedan Law—concld

22 Bom 509, disapproved. *Held*, further, (after laying down the proper procedure to be followed in cases of this description) that the choice had to be made in the first instance by the guardian for marriage, and if on the materials before the District Judge he was satisfied that the marriage was not unsuitable he was to sanction it. *Held* also that the order of the District Judge was not open to appeal as s 47, cl (a) of the Guardians and Wards Act read with s 43 subs (1) and ss 24, 25 and 26 did not cover the case. *Monsiam Bibi v District Judge, Birsut* (1914) 1 L R 42 (ALC).

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Wakf—Constitution of wakf by deed of trust—Objects charitable and religious—Validity of wakf. Where with the object of dedicating a house to the service of the Imam, Hassan and Husain, and for other religious purposes, the settlor had conveyed the house to his grand daughter and his grand son on trust for the proper observance of the objects mentioned in the deed. *Held* that there was a valid wakf. *Delross Banoo Begum v Ashgur Ally Khan*, 15 B L R 167, discussed *Phul Chand v Akbar Lal Khan* 1 L R 19 All 211 *Biba Jan v Kalb Hussain* 1 L R 31 All 136 *Ma har Hussam Khan v Akbar Hadi Khan* 1 L R 33 All 400, referred to *RAN CHARAN LAW v FATIMA BEGAN* (1915) 1 L R 42 CALC ..

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Maritime Necessaries: See ARREST OF SHIP 80

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followed <i>Son't Koor v Hammul</i>		under s 16 of the Provincial Insol-	
<i>Bahadoor</i> I L R 1 Cal 391,		vency Act merely replaces the insol-	
distinguished <i>KUNJA BEHARI</i>		vent partner in respect of the busi-	
<i>SEAL v DURGHA PRASAD SINGH</i>		ness of the firm. The position of a	
(1914) I L R 42 Cal .	346	receiver is the same both with	
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adjudicated an insolvent <i>Forrell</i>		Code (Act V of 1898) s 239	
& <i>Christmas v Gilbert Walter</i>		Where in consequence of certain	
<i>Beauchamp</i> [1894] A C 607,		persons having killed a cow on a	
followed. The creditors of the		zamindar's estate contrary to prac-	
firm are not entitled to proceed		tice and eaten its flesh they were	
against him personally being res-		taken to the <i>cutcherry</i> on the 14th	
tricted only to his interest in the		December fined therefor and con-	
property of the firm (<i>vide</i> s 247 of		fined till they had furnished security	
the Indian Contract Act). There		for the payment of the fine within	
is no difference in principle between		three days and on their failure to	
the nature of the liability of an		do so were again taken to the	
infant admitted by agreement in a			
partnership business and that of			
another (eg, a Hindu) on whose			
behalf an ancestral trade is carried			
only his guardian <i>Tokristo v</i>			
<i>Nuttanand</i> I L R 3 Cal 738			
<i>Ram Pratab v Foolbas</i>, I L R			
20 Bom 767 referred to. It is not			
open to the Court to direct the			
receiver in insolvency to deal with			
assets other than those belonging to			
the persons who have been adjudi-			
cated insolvents <i>Forrell & Christ-</i>			
<i>mas v Gilbert Walter Beauchamp</i>			
[1894] A C 607 explained			
Whereas in England the bankruptcy			
of a partner works dissolution of			
the partnership without an order of			
the Court it is not so in India.			
<i>vide</i> ss 253 254 of the Indian			
		were parts of the same transaction,	
		the object of the accused on both days	
		being the same viz to punish the	
		persons for a breach of the rule by	
		extorting the fine and the assault	
		on the second day being the con-	
		clusion of the transaction and that	
		the joint trial of the accused for	
		offences under s 347 of the Penal	
		Code committed on the 14th and	
		18th and for that under s 352 on	
		the latter date by them was legal	
		<i>Emperor v Datto Hanmant Shaha</i>	
		<i>pirkar</i> I L R 30 Bom 49 and	
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Misjoinder—concld

Calc. 292, and *Gul Mahomed Sircar v. Cheharu Mandal*, 10 C W N. 53, distinguished *DEPUTA LERAI REMEMBRANCE* r *KAILASH CHANDRA GHOSH* (1914) I L R 42 Calc. 760

Misjoinder of Charges See CHARGE ... 957

*Joint trial for offences under s 120B of the Penal Code and ss 19(f), 20 of the Arms Act, committed in pursuance of the object of the conspiracy—Identity of transaction—Criminal Procedure Code (Act V of 1893) s 239—Joint possession of arms—Here keeping of fire arms not an offence Fire arms whether inclusive of parts of the same—Arms Act (XI of 1878) ss 4, 5 14, 19 (a) (f) 20—Criminal conspiracy, proof of—Punishment when act contemplated not done—Penal Code (Act XLV of 1860) ss 109, 110 120B A charge of criminal conspiracy to manufacture arms, under s 120B of the Penal Code read with section 19 (a) of the Arms Act (XI of 1878) may be tried jointly with charges of offences under ss 19 (f) and 20 of the latter Act committed in pursuance of the object of the conspiracy As long as the conspiracy continues the transaction which began with the forming of the common intention continues and the offences under ss 19 (f) and 20 of the Arms Act as committed in the course of the same transaction *Legal Remembrancer Bengal v. Mon Mohan Roy* 19 C W N 672, 21 C. L. J 195 followed Where two persons rented a house and lived in it, and parts of arms were found in one of the rooms—*Held*, that both being in joint occupation of the house were in joint possession of the articles so found The word "fire arms" in s 14 read with the meaning of "ar" in s 4 of the Arms Act includes parts of fire arms "Fire arms" means only arms fired by gunpowder or other explosives *Ahmed Hossein**

Misjoinder of Charges—concld.

Queen Empress, I L R 27 Calc 692, *Emperor v. Dhan Singh*, 5 Cr L J 435, 3 N L R 53, followed The offence under ss 5 and 19 (a) of the Arms Act is not a mere keeping of arms, but a keeping of the same for sale In cases of conspiracy the agreement between the conspirators cannot generally be directly proved, but only inferred from the established facts of the case Where two persons took a house in which a considerable number of pieces of fire arms was found with tools and implements, and work had been actually done to some of the parts of fire arms, the Court may and ought to infer a conspiracy to manufacture arms. *Per Curiam* Where there is only a conspiracy to manufacture arms, without an actual manufacture the sentence should be imposed under s 120B of the Penal Code read with s 19 (a) of the Arms Act and s 116 of the Penal Code and the maximum term of imprisonment awardable under these sections is 9 months rigorous imprisonment *Per BEACHROFT J* The punishment awardable under s 120B of the Penal Code varies according as the offence has or has not been committed in consequence of the conspiracy If an offence has been committed, the punishment is that provided by s 109 of the Penal Code though, strictly speaking, there should not be a conviction in such cases of conspiracy but of abetment If it has not been committed the punishment is governed by s 116 of the Penal Code *HARSHA NATH CHATTERJEE v. EMPEROR* (1914) I L R 42 Calc. . 1153

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—Interest—Loss of part of security by acquisition of mortgaged land—Mortgagee applying to Land Acquisition Judge for return of mortgage money (out of the compensation money) within term, whether entitled to interest for the whole term—Land Acquisition Act (I of 1894) ss 18, 30—If the mortgagee makes a demand for payment within the term and the mortgagor complies the mortgagee cannot insist upon payment of interest for the whole of the term <i>Letts v Hutchins</i> L R 13 Eq 176 <i>In re Moss</i> 31 Ch D 90 <i>Smith v Smith</i> [1891] 3 Ch 550 referred to Where the mortgagee has given notice requiring payment within the term he cannot withdraw it without the consent of the mortgagor <i>Sinley v Wilde</i> , [1899] 1 Ch 747, 2 Ch 474 followed Where the mortgagor agreed to keep the money for one year from 28th September 1912 on condition that the land should remain as security for the loan during the term but one of the properties given as security had been acquired (the mortgagee probably having no knowledge thereof) and on the 11th October 1912 the mortgagor applied to the Land Acquisition Deputy Collector that the money due under the mortgage (including one full year's interest) might be paid to him out of the compensation money, and the mortgagor consented <i>Hell</i> that as the contract between the parties could not be performed according to its letter by reason of circumstance beyond their control, the mortgagee was not	

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bound to pay interest beyond the period of one month (as admitted by him) <i>Bakhtawar Begam v. Husaini Khanam</i> , I L R 36 All 195, explained <i>PROKASH CHANDRA GHOSH v HASAN BANU BIBI</i> (1914) I L R 42 Cal ...	1146
—Sale of mortgaged property for any claim of mortgagee unconnected with mortgage—Civil Procedure Code (1st of 1908), O XXXIV, r 14—Transfer of Property Act (IV of 1882), s 99. A mortgagee is competent, under the Civil Procedure Code of 1908, to have his mortgaged property sold in satisfaction of any claim which he may have against the mortgagor, though the claim may be unconnected with the mortgage. <i>TARAK NATH ADHIKARI v BHUBANESHWAR MITRA</i> (1914) I L R 42 Cal ...	780
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Occupancy Holding—Non transferable occupancy holding whether devisable by will—Bengal Tenancy Act (VIII of 1935) ss 26, 17, sub s (3) cl (d)—If stopped by testator's act from claiming inheritance under the statute A non-transferable occupancy holding cannot be the subject of a valid	

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testamentary disposition In the case of a testamentary devise of such a holding, the heir at law is not debarred by the doctrine of estoppel from questioning its validity. *Hari Das Bairagi v. Uday Chandra Das*, 12 C W N 1086, 8 C. L. J. 261, not followed. *ANIL K. RAYAN SINGH v. PARINATH DEB*, (1914) I L R 42 Cal.

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Revenue Sale Law (Act XI of 1859) s. 37—Occupancy raiyats at fixed rates—Purchaser—Doctrine of Protection—Its extension The protection of occupancy raiyats at fixed rates referred to in s. 37 of the Revenue Sale Law (Act XI of 1859) is not one of the ordinary exceptions in that section. It is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land who are in actual occupation of the soil and are cultivating it. This doctrine of protection has recently been extended to ordinary occupancy raiyats. *Sarat Chandra Roy v. Asiman Bibi*, 1 L R 31 Cal. 725 referred to. *Bhut Nath Naskar v. Surendra Nath Dutt*, 13 C W N 1025 distinguished. *ABDEL GANI CHOWDHURY v. MAKBUL ALI* (1914) I L R 42 Cal.

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Transferability of part or whole—Consent of land lord—Operation of transfer as against raiyat landlord and other persons—Civil Procedure Code (Act XIV of 1882) s. 214—Bengal Tenancy Act (VIII of 1885) s. 87 In transfers for value of occupancy holdings apart from custom or local usage (i) The transfer of the whole or a part is operative against the raiyat—(a) Where it is made voluntarily (b) where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside. A sale is made involuntarily where it is in execution of a money decree, but

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not of a decree founded on a mortgage or charge voluntarily made (ii) The transfer is operative as against the landlord in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent. Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding but where the transfer is of a part only of the holding, or not by way of sale, the landlord though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been (a) an abandonment within the meaning of s. 87 of the Bengal Tenancy Act, or (b) a relinquishment of the holding, or (c) a repudiation of the tenancy. Whether there has been a relinquishment or repudiation or not depends on the substantial effect of what has been done in each case (iii) The transfer of the whole or a part is operative as against all other persons where it is operative against the raiyat. *DAYANATH ANANDA MOHAN ROY CHOWDHURY*, (1914) I L R 42 Cal.

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Palas or turns of worship—Mortgage—Transferability of palas—Custom—Khatighat Temple—Estoppel of mortgagor even if trustee—Essential attributes of valid custom—Public

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policy, contravention of *Onus pro bandi*—Civil Procedure Code (Act V of 1908), O XXXIV—*Chattels*—Intangible property, foreclosure of mortgage of—Pledge *Per MOOKERJEE J* (BEACHROFF J reserving opinion) A mortgagor even when acting in a public capacity and not for his own benefit, is estopped to deny his title and cannot set up as a defence for himself against the mortgagee that the property so mortgaged is trust property which he had no right to mortgage. *Doe v Horne*, L R 3 Q B 760 61 R R 397, followed. This principle is inapplicable where the mortgage is void as contrary to Statute. *Narrow's Case* 14 Ch D 432 followed. Trustees for a public purpose are not by the nature of their office protected from the operation of estoppel as against the assignees of the original parties to the deed in question. *Doe v Horne* L R 3 Q B 760 61 R R 397. *Webb v Herne* L R 5 Q B 642, and *Higgs v Isam Lea Co* L R 41 Ch 487 referred to. [View indicated by BANERJEE J in *Mallika v Ratan* man 1 C W 493, not accepted.] *Per MOOKERJEE and BEACHROFF JJ* 'A custom to be valid must have four essential attributes: (i) it must be immemorial; (ii) it must be reasonable; (iii) it must have continued without interruption since its immemorial origin; and (iv) it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. *Tyars v Smith* 9 Ad & El 406, followed. A custom cannot be enlarged by parity of reasoning. *Arthur v Bokenham* 11 Mo 148, *Pradyote v Gopi Krishna* 11 R 37 Cal 322 referred to. A custom originating within time of memory,

Palas or turns of worship—contd

even though existing in fact, is void at law. *Mayor of London v Cox*, L R 2 H L 239, followed. Evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go raises the presumption though only a rebuttable one, as to the immemorial existence of the custom. *Lastard v Smith*, 2 Moo & R 129. *Mercer v Denne*, [1904] 2 Ch 534, followed. If the existence of the custom has been proved for a long period, the onus lies on the person seeking to disprove the custom to demonstrate its impossibility. If a custom be an unjust reason (i.e. artificial and without reason warranted by authority of law) it has no force in law. When a custom is said to be void as being unreasonable, the unreasonable character of the alleged custom conclusively proves that the usage even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any rights conferred in ancient times. *Salisbury v Gladstone*, 9 H L C 692 followed. The period for ascertaining, whether a particular custom is reasonable or not, is the time of its possible inception. *The Tanistry Case*, (1808) Davis 29, followed. In practice, the Rajghat Temple palas have been transferred during at least 90 years though in a limited market which those alone can enter who are qualified to become sheldat by birth or marriage, the time when this custom originated being unknown. Proof of the existence of a custom need not be carried back by direct evidence to the year 1773 when the Supreme Court was established, or even to 1793 when the first Regulations were passed by the Indian Legislature. The customary right to make a sale, mortgage, gift or lease of a pala in favour of persons within a limited circle (the trans

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Palas or turns of worship—*concl'd*

feece being under precisely the same obligation to the endowment as the transferor himself, is closely associated with and possibly developed out of the heritable, devisible, and partible character of a *pala*. *Jinnlee v Gopant* I L R 2 Cal 365, referred to. A custom of this description clearly cannot be characterised on any rational grounds as unreasonable or opposed to public policy. Foreclosure as a remedy of the mortgage is not confined to mortgages of land, it is equally applicable to mortgages of chattels. *Harrison v Hart* 1 Comyn 393 2 E. 114. Ab. 6 followed. A mortgagee of intangible property is entitled to foreclose the mortgagor quite as much as a mortgagee of chattels. *MAHA MATA DEBI v HARIDAS HAIDAR* (1914) I L R 42 Cal.

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Pardanashin. See PRESENTATION OF COMPLAINT

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—, examination of. See COMPLAINT

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Pardon—*Failure of approver to comply with terms of the pardon on examination at the preliminary enquiry—Forfeiture of pardon—Commitment of approver along with the accused—Joint trial of approver and others—Plea of pardon taken in the Sessions Court—Proper procedure thereon—Trial of question of forfeiture as a preliminary issue—Power of Jury to determine the point—Criminal Procedure Code (1st V of 1858) = 298 (1) (c) 37. Where an approver has forfeited his pardon on his examination at the preliminary enquiry the Magistrate may put him in the dock, recommence the enquiry and commit him for trial along with the other accused. *Queen Empress v Aatu* I L R 27 Cal 137, discussed. *Queen Empress v Brij Narain Man* I L R 20 All 529, *Emperor v Budhan* I L R 29 All 24 *Sultan Khan v King Emperor*,*

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5 All L J 691, and *King Emperor v Bala*, I L R 25 Bom 675, followed. When an approver has been committed to the Court of Session as an accused he may plead his pardon in bar at the trial, and the Judge must first try the issue of forfeiture and take the verdict of the Jury thereon and then proceed with the trial of accused for the offences charged. *Emperor v Abani Bhushan Chuckerbutty* I L R 37 Cal 845 discussed. *Kullan v Emperor* I L R 32 Mad 173, *Magirusami Naiken v Emperor* I L R 33 Mad 514 *King Emperor v Bala* I L R 25 Bom 675 *Emperor v Kothia*, I L R 30 Bom 611, and *Emperor v Aatu* 31 Punj Rec, 1904 approved. *PER BRACHROFT J*. Under the old law the pardon remained in force until its withdrawal by the authority granting it in consequence of the approver failing to observe the conditions of the pardon but under the present law the result of such failure is that the approver may be put on trial without any formal order of withdrawal or cancellation of the pardon. The plea should be taken at the commencement of the preliminary enquiry and considered by the Magistrate. If he decides against it or it is not taken before him, the approver may raise the plea in the Sessions Court. The Judge ought to try the question of forfeiture as a preliminary issue on evidence limited to the point, and take the verdict of the Jury on it before proceeding to try the general issue of the guilt of the accused. The onus of proof of forfeiture is on the Crown. *Queen Empress v Manick Chandra Sarkar*, I L R 24 Cal 492 declared absolute. Where however the Judge tried the question of forfeiture with the Jury after some evidence on the general issue had been recorded—

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Held, that the irregularity had not prejudiced the approver or the other accused. *Semle*. When the approver deviates from the conditions of his pardon in the Sessions Court, he cannot be removed from the witness box and placed in the dock as an accused. *SHASHI KAJ DASHI v. EMPEROR* (1914) 1 L R 42 Calc.

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— *Withdrawal by Magistrate not granting the pardon—Omission to state grounds of forfeiture—Necessity of formal withdrawal or declaration of forfeiture—Plea of pardon to be raised at the trial—Trial of issues of forfeiture of pardon and guilt of accused—Criminal Procedure Code (Act V of 1898) ss 337, 339.* Under the present law no formal withdrawal of pardon nor formal declaration of its forfeiture are required. If the approver he subsequently proceeded against it is open to him to plead at his trial that the pardon has not in fact, been forfeited, that is, that he has not violated its conditions. The two questions of forfeiture of pardon and of his guilt of the offence in respect of which he received the same, may be heard and determined together, under the circumstance. *Emperor v. Kothia*, 1 L R 30 Bom 611, *Kullan v. Emperor* 1 L R 32 Mad 173 and *Emperor v. Ifau Bhushan Chuckerbutty* 1 L R 37 Calc 815 referred to. *Emperor v. SABAIR AKINJI* (1914) 1 L R 42 Calc.

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Parties—Civil Procedure Code (Act I of 1908) s 92, O I r 3—Public Religious Trust—Suit to remove a trustee and to recover possession of trust property in the hands of a third party—Joinder of parties—Alienation of trustee. Where in a suit under s 92 of the Civil Procedure Code (Act I of 1908), the second defendant, who was the alienor of trust property, the subject of the suit, contended that the suit should be dismissed as against him on the

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ground that he was not a necessary party to it—*Held*, that there is no reason why, having regard to the provisions of O. I r. 3 of the Civil Procedure Code, the second defendant should not be made a party to the suit, nor why, if the decision of the Court is against him, he should not be declared to be a trustee of the trust property and be directed to convey the property. *Budh Singh Dhudhuria v. Niradbaran Roy*, 2 C L J. 431, and *Budree Das Mukim v. Choony Lal Johurry*, 1 L R 38 Calc. 789, distinguished. *Compania Sansi nena de Carnes Congeladas v. Houller Brothers*, [1910] 2 K. B 354, referred to. *ALI HAFIZ v. ADDOR RAHAMAN* (1915) 1 L R. 42 Calc. ...

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Partition: See BABU NA GRANT ... 582

— *See COSTS* ... 451

Partnership, dissolution of: See MINOR 225

— *winding up of: See APPEAL* 914

Part-payment: See CHEQUE, PAYMENT BY ... 1043

Patni Lease—Chota Nagpur Encumbered Estates Act (Bengal VI of 1876 as amended by Act I of 1884) s. 17—Rules under s 19 of Act, Rule 16—Patni lease executed by Deputy Commissioner as manager of Patnam Estate under the Act—Sanction of Commissioner—Objection that patni lease had not been submitted to Commissioner after he had sanctioned all the details—Sanction granted for lease to a firm and lease given to a Limited Company—Stipulation for payment of bonus—Payment after time fixed. The grant of a patni lease under the Chota Nagpur Encumbered Estates Act (Bengal Act VI of 1876 as amended by Act V of 1884) s. 17, and rule 16 of the rules made under the Act, necessitates the sanction of the Commissioner. In a suit to have a patni lease executed

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Patni Lease—<i>contd</i>		Patni Lease—<i>contd</i>	
by the Deputy Commissioner as the manager under the Act of the Barabhum Estate on behalf of the proprietor, the father of the plaintiff (appellant) declared void and inoperative as not having received a valid sanction— <i>Held</i> that where it was been affirmatively established that a transaction itself in all its essential particular has obtained the sanction of the Commissioner and then it becomes requisite that the transaction be carried into effect by the preparation of an appropriate deed an objection merely on the ground that the document ultimately prepared has not been submitted for sanction, cannot be sustained. In administrative and departmental action it must be recalled that the case that formal details may have to be entered upon in order to carry into effect, and put into legal shape the arrangement to which the sanction was given. Where such a sanction was given for a patni lease to be granted to Robert Watson & Co. a firm of individual men and the actual lease was executed in favour of Robert Watson & Co. Limited the firm having been converted into a Limited Company— <i>Held</i> on the facts of the case that when the negotiators in the course of the correspondence mentioned Robert Watson & Co., they did in fact mean and were perfectly understood to mean Robert Watson & Co. Limited the fact of the incorporation of the Limited concern being well known and that therefore the mere description did not under the ordinary principle applicable to such matters affect the validity of the sanction or of the patni lease. In this view it was unnecessary to decide as to the effect in law of the difference in the <i>persona</i> of the two descriptions. <i>Held</i> also that the sanction of the Commissioner in this case was not merely a sanction of a proposal to grant a patni		The proposal had been made, it had been accepted, a contract was accordingly completed on the subject, and it was that contract so completed that was sanctioned. The patni lease stipulated for the payment of a <i>salami</i> or <i>lonus</i> and the letter granting the sanction contained the clause provided the amount be paid before the end of March 1890. Some delay occurred owing to an exchange of views being necessary as to the actual wording of the draft patni but the lease was finally settled by both parties, and the <i>salami</i> was paid on 25th June 1890— <i>Held</i> , that the lease would not afterwards have been open to a challenge to be made by the Deputy Commissioner himself or for the Commissioner's sanction to be withdrawn and <i>a fortiori</i> there was no ground for sustaining such a challenge when put forward long afterwards on behalf of the defendant successively whom the suit was brought. <i>RAM KANAI SINGH DEB. DAKSHANAH MATHEWSON (1915) I L R 42 Cal.</i>	1029
		Penal Code (Act XLV of 1860) ■ 109, 116 120 ■ See MISJOINDER OF CHARGES	1153
		120A 120B 121A See CHARGE	957
		See WARRANT VALIDITY OF	708
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		Penalty See INTEREST	602 690
		Perjury—Witness—Deposition not read in the hearing focused or his pleader but read by witness himself—Inadmissibility of deposition in subsequent trial for giving false evidence—Proceeding against witness—Preliminary inquiry—Omission to read statements of witnesses examined thereat—Order for prosecution not containing assignment of the false statements—	

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Perjury—concl'd		Practice	See BAILIFF 313
Criminal Procedure Code (Act V of 1898, ss 360 (1) 476—Practice Section 360 (1) of the Criminal Procedure Code requires the evidence of a witness to be read over to him in the hearing of the accused or his pleader so as to enable the latter to correct any mistakes in it. The reading of the deposition by the witness himself is not a compliance with the section and renders the record of it inadmissible in a subsequent trial against him under s 193 of the Penal Code. <i>Maheindra Nath Misser v Emperor</i> 13 C W N 845 and <i>Jyotish Chaitra Miskerjee v Emperor</i> 11 I 36 Cal 950 followed. Although s 476 of the Criminal Procedure Code does not expressly provide for the manner in which the preliminary inquiry thereunder is to be recorded a summary of the statements of the witnesses examined thereat should be made. An order under the section is		See CONTEMPT OF COURT 1169	
		See EVIDENCE	784
		See INSOLVENCY	109
		See MAHOMUDAN LAW—MARriage	301
		See PERJURY	240
		See PUBLIC PROSECUTOR 1071	
		OR	422
		See RATEABLE DISTRIBUTION	1
		Reference—Assessment of damages. A reference should be directed by the Court to assess damages only when the enquiry would involve questions of detail which it would be wasting the time of the Court to investigate. <i>Hallis v Sayers</i> 6 F I R 356 referred to. <i>D N GHOSH & Bros v LOJAT NARAIN BROS</i> (1915) 11 I R 42 Cal.	819
		Preliminary Decree	See APPEAL 914
		Preliminary Inquiry	See PERJURY 240
		Preliminary Mortgage decree	See LIMITATION 776
		Prescription	See EASEMENT 164
		Presentation	See COMPLAINT 19
		Presidency Magistrates	See DISTRICT MAGISTRATE TRIAL 313
		Presidency Small Cause Courts Act (XV of 1882, ss 43 48	See BAILIFF 313
		Presidency Towns Insolvency Act (III of 1909) s 31 (4) (5)	See INSOLVENCY 109
		Prize Act (I of 1910) s 4 ()	See FORFEITURE 730
		Primogeniture	See HINDU LAW—INHERITANCE 1179
		Principal and Agent	See SALE OF GOODS 1050
		Priority	See CO-OPERATIVE SOCIETY 377
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of sentences pending hearing of petition, refusal of—Tendering advice as to exercise of King's Prerogative of pardon (On an application for special leave to appeal in a case in which the petitioners had been sentenced to death, their Lordships of the Judicial Committee not being a Court of Criminal Appeal declined to interfere with regard to staying execution of the sentences pending the hearing, or to express any opinion as to whether they ought to be suspended.) The tendering of advice to His Majesty as to the exercise of His Prerogative of pardon is a matter for the Executive Government, and is outside their Lordships' province. **BAL NUKUND v KING EMPEROR** (1915) I L R 42 Cal

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Probate: See GLADIAN

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Probate—Relocation—Will, validity of—Proof in common form—Knowledge—Acquiescence—Delay—Probate and Administration Act (V of 1881) s. 50 It does not matter by what facts knowledge of the grant of probate and acquiescence in it are established for neither knowledge nor acquiescence nor lapse of time or of themselves operative as a bar to the proceeding which every person interested in the estate of the testator has a right to bring, if he was not made a party in the probate proceeding. His application must be *bona fide* and he must give some reasonable and true explanation of the delay. **Hoffman v Norris**, 2 Phillim 230, **Merryweather v Turner** 3 Curt 802, and **Kunja Lal Chowdhury v Kailash Chandra Chowdhury** 14 C W N 1068 referred to. **MANORAMA CHOWDHURANI v SHIVA SUNDARI MOYUNDA** (1913) I L R 42 Cal

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Probate and Administration Act (V of 1881) s. 50: See PROBATE

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Procedure: See COMPTON OF COURT ... 1169

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Proof in common form: See PROBATE ... 480

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Prosecution, duty of: See CHARGE ... 957

Protection, doctrine of: See OCCUPANCY HOLDING ... 745

Provident Insurance—Company with share capital carrying on business of a provident insurance society—Inability to registration as such before receiving premiums—Provident Insurance Societies Act (V of 1912) ss. 2 (3) 6, 7, 21. A company having a share capital divided into shares must, if it intends to carry on the business of a provident insurance society, be registered under the Provident Insurance Societies Act (V of 1912) before it receives any premium or contribution. **Oriental Government Security Life Assurance Co v Oriental Assurance Co**, I L R 40 Cal 570, explained. **DEPUTY LUGAI RENEUBRANCER v SITAL CHANDRA PAL** (1914) I L R 42 Cal ... 300

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Provincial Insolvency Act (III of 1907), ss. 4 clis (b), (g), 10: See MINOR ... 225

ss. 13, 16, 34: See INSOLVENCY ... 289

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8: See HOME STEAD LAND ... 638

Public Demands Recovery Act (Beng. I of 1895, 1897): See SALF FOR ARREARS OF REVENUE ... 765

Public Nuisance—Encroachment on public pathway—Application to District Magistrate by letter—Reference of applicant by letter to Civil Court—Subsequent petition to

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the Subdivisional Magistrate regarding the same pathway—Issue of conditional order—Appearance of opposite party and claim of title to the path—Dropping proceedings without taking evidence—Criminal Procedure Code (Act V of 1893) ss 133, 137 When a Magistrate makes a conditional order under s 133 of the Criminal Procedure Code against a party who appears and shows cause he is bound under s 137, to take evidence as in a summons case It is open to him thereafter to consider whether there is a complete answer to the case, or whether it is not a proper one for reference to the Civil Court SAROJBASHINI DEBI v. SHRIATI CHARAN CHOWDHRY (1914) I L R 42 Calc ..

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Unlawful obstruction to public way—Bona fide question of title—Duty of Magistrate to determine the question—Criminal Procedure Code (Act V of 1893) ss 133, 137 Per SHARFUDDIN J When a party against whom an order under s 133 of the Criminal Procedure Code is contemplated, appears and raises the question that a pathway, alleged to have been unlawfully obstructed, is not a public but a private one the Magistrate should not only decide whether it is public or private but he should determine whether the claim is bona fide or a mere pretence set up only to test the jurisdiction of the Court If he finds that the claim is a mere pretence, he may proceed to pass a final order, but if he finds that the claim though not substantiated, has been raised bona fide he should stay his hand and refer the party to the Civil Court, and if the party does not have recourse to such Court within a reasonable time, the Magistrate may then proceed to make the order absolute DEBUT ALI v. Abdur Rahim, B

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C W N 143, Matukdhar Tewari v. Hari Madhab Das, 9 C. W N. 72, Luckhee Narain Banerjee v. Ram Kumar Mukherjee, I L R 15 Calc 564, and Preonath Dey v. Gobordhone Mialo, I L R 25 Calc 278, referred to. The provisions of s 133 of the Code should be sparingly used TENDON J, in the circumstances of the case assented to the order proposed MANICK DEB v. BIDHU BHUSHAN SARKAR (1914) I L R 42 Calc ...

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Public Pathway, encroachment on: See PUBLIC NUISANCE ..

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Public Policy: See SLAVERY BOND .. 742
contravention of: See PALAS OR TURNS OF WORSHIP .. 455

Public Prosecutor, duty of—Duty to produce all the evidence in his power bearing directly on the charge—Duty to call all the available eye witnesses in capital cases—Omission to examine material witnesses, effect of—Inference adverse to the prosecution arising there from—Practice The purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the

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of the responsibility attaching to his position It is not his duty to call only witnesses who speak in his favour IMPRESS v. DHUNNO AAZI, I L R 8 Calc 121, discussed and explained He should, in a capital case, place before the Court the testimony of all the available eye witnesses though brought to the Court by the defence, and though they give different accounts The rule is not a technical one, but founded on common sense and humanity REG v. HOLDEN, 8 C & P 609,

Public Prosecutor, duty of—*concl'd*

followed Where witnesses (who from their connection with the transactions in question must be able to give important information) are not called without sufficient reasons being shown, the Court may properly draw an inference adverse to the prosecution *Impress v. Dhanno Kars*, I L R 11 Cal 121, referred to A conviction under s 114 of the Penal Code cannot stand where the abettor charged necessarily requires the presence of the abettor To come within the section the abettor must be completely apart from the presence of the abettor *Ram Panjan Roy v. Emperor* (1914) I L R 42 Cal

Public Religious Trust. *See* PARISH 1130

Public Way obstruction to. *See* PUBLIC NUISANCE 158

Purchaser *See* OBIAN & HODDIN 745

Railway Company liability of *See* REMAND 888

Railways Act (IX of 1890) s. 75 *See* REMAND 888

Rateable Distribution—*Practice and Procedure—Decree—Civil Procedure Code* (Act I of 1908) s. 47 73—*Civil Procedure Code* (Act XII of 1882) s. 295—*Appeal* An order refusing rateable distribution made under s 73 of the Code of Civil Procedure (Act V of 1908) between two rival decree holders, which does not affect or interest the judgment debtor, is an order in execution proceedings but is not a decree as all the conditions enumerated in s 47 of that Code are not present and consequently is not appealable *Jagdish Chandra Shaha v. Kripanath Shaha* I L R 36 Cal 130 followed *Norabji Cootari v. Kala Raghunath* I L R 36 Bom 151 distinguished It is essential for the application of s 73 of the Code of Civil Procedure that the decree should have been passed against the same

Rateable Distribution—*concl'd*

judgment debtor *BALMER LAWRIE & Co v. JADUNATH BANERJEE* (1914) I L R 42 Cal

Rates and Taxes, arrears of—*Consolidated rate—Charge—Calcutta Municipal Act* (Beng III of 1899), ss 223, 228—*Measure of consolidated rates, whether a first charge on the land and building in respect of which it has accrued due—Charge and mortgage distinction between—Transfer of Property Act* (IX of 1882) s. 55 58 100—*Bengal Tenancy Act* (VIII of 1885) s. 171—*Constructive notice—Bona fide purchaser for value without notice* Section 228 of the Calcutta Municipal Act is not controlled by section 223 thereof, and makes the consolidated rate as it accrues due from time to time, a first charge on the premises (subject only to arrears of land revenue) A mortgage does where as a charge does not, involve a transfer of an interest in specific immovable property *Narayana v. Venkataraman* I L R 25 Mad 220 *Panvel v. Delagoa Bay Co* 23 Q B D 289, *Burlinson v. Hall* 12 Q B D 347 referred to Such a charge cannot be enforced against the property in the hands of a bona fide purchaser for value without notice *Kishen Lal v. Ganga Ram* I L R 13 All 28 referred to The plea of purchaser for value without notice is a single defence the onus of proving which is on the defendant *Attorney General v. Phosphate & Guano Co* 11 Ch D 327 *Wilkes v. Spooner* [1911] 2 K B 473 followed Where property with such a charge is foreclosed by the mortgage constructive notice cannot be imputed to him to the same extent as to a purchaser at a private sale *Kadha Mathab v. Kalpataru* 17 C L J 209 *Brahma v. Bholi Das* 19 C L J 352 referred to Still he should ascertain the true state of affairs

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referred to AHID KHONDKAR & MAHENDRA LAL DE (1915) I L R 42 Cal	830
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Extradition warrant issued by Resident in Nepal—Proceedings thereon by District Magistrate in British India, and order of surrender of fugitive—Power of High Court to interfere in revision with such order—Nepal whether a Foreign State—Criminal Procedure Code (Act V of 1898) ss 435, 439, 491—Extradition Act (VI of 1903) ss 7, 15 Nepal is now a Foreign State within the meaning of the Indian Extradition Act (XV of 1903) Where a warrant has been issued by the Political Agent, under s 7 of the Act its execution by the District Magistrate in British India in accordance with the Act is an executive act and the High Court cannot interfere in revision with the proceedings of the Magistrate and the order to surrender the fugitive criminal but if the latter considers himself aggrieved thereby he can invoke the action of the Government under s 15 The power of the High Court however to interfere under s 491 of the Criminal Procedure Code, which applies whatever be the occasion of the deprivation of the liberty of the subject remains untouched by the Extradition Act GEL & SAH & EVENDEN (1915) I L R 42 Cal	793
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of 1895 as amended by Beng Act I of 1897)—Embankment Act (Beng Act II of 1882) In this case the High Court set aside a sale for arrears of revenue holding that where the Collector had acknowledged payment in full of the arrears of land revenue for which the sale had been advertised, and had elected to proceed by certificate procedure against an arrear of different character and had already directed a sale under that procedure, he could not turn round and treat the arrear under the certificate as an arrear of land revenue without any notice to the parties under section 5, and proceed to sell under the land revenue proclamation or the mere ground that no special exemption had been passed The em- bankment charges ordered to be levied under the Certificate Act (Beng Act I of 1895 as amended by Beng Act I of 1897) were taken out of the purview of Act XI of 1869 unless and until fresh notices were issued under section 5 and they could not be treated as arrears of land revenue The sale therefore, not being for an arrear of land revenue, was liable to be set aside An appeal from that decision was dismissed by their Lordships of the Judicial Committee who said they saw no reason to interfere with it DHIRAJ CHANDRA BOSE & HARI DAS DEBI (1914) I L R 12 Cal	765
Setting aside sale—Defect in specification of property to be sold in notification of sale—Ismali share in property where there are many separate accounts opened—Revenue Sale Law (Act VI of 1859) ss 6, 10, 11, 13, 33—Inadequacy of price caused by want of proper specification of the property for sale The ismali or joint share in a mahal in which 14% of the owners of specific but unliquidated shares had obtained	

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Sale for Arrears of Revenue—contd	Sale for Arrears of Revenue—concl'd
from the Collector separation of accounts under sections 10 and 11 of Act XI of 1859 was put up to sale for arrears of revenue, and purchased by the respondent. In the notification under sections 6 and 13 of the Act, the specification of the share to be sold was in the following terms— <i>Ismali</i> share which cannot be specified excluding the separate accounts, number—Then followed a list of the 148 separate accounts referred to and at the end it was stated that 'All other shares be ites that specified are excluded from the sale. And the entry in column 5 (the specification column) was 'The <i>Ismali</i> share cannot be particularised owing to separate accounts having been opened. The shares to be sold are those given in a separate sheet after excluding the shares in respect of which the separate accounts have been opened. In a suit to set aside the sale— <i>Held</i> (reversing the decision of the High Court) that the notification of sale was insufficient and irregular and not in compliance with the requirements of the law. Each case must depend on its own particular facts and what had to be considered was whether having regard to all the circumstances the specification was sufficiently clear to induce likely buyers to appear and bid at the sale. It was not enough that they might go and obtain the requisite information from the Collector's office. The particulars in the notice should be sufficient in themselves to tell purchasers what they were invited to bid for. <i>Held</i> also on the evidence, that the property had been sold at an inadequate price, and that the lowness of the price was due to the defectiveness of the specification of the property to be sold in the notification of sale which was not merely an irregularity but a defect that rendered the	<p>sale void. <i>RAVANESHWAR PRASAD SINGH & BAIJNATH RAM GOENKA</i> (1915), 1 L R 42 Calc . 897</p> <p>Sale of Goods—Bought and sold notes— <i>'Bought by your order and for your account from our principals'</i> <i>—Principal and Agent—Personal liability of brokers—Contract Act (IX of 1872) s 230 (2)—Broker, an intermediary—Contract of employment—Award Where a</i></p> <p>joint order and for 'your account from our principals 250 bales of jute (name) Brokers,' and a corresponding sold note was signed and sent by the broker to another party, the names of the principals being disclosed to each other, by the broker, at a subsequent date—<i>Held</i>, in proceedings taken by the buyer, that the broker was merely an intermediary and not an agent for sale, and was not liable under section 230 (2) of the Contract Act. The contract (if any) between the broker and the buyer was a contract of employment, the employment being to negotiate and not to do on behalf of another. <i>Smithell v Bonditch</i> 1 R 1 C P 374 followed. <i>Gibbon v Aetion</i>, 1 L R 17 Calc 449, distinguished. <i>PATIBAN BANERJEE & KANKARRAH CO LD</i> (1915) 1 L R 42 Calc 1050</p> <p>Sanad, construction of. See <i>JALIR</i> 805</p> <p>Sanction See <i>PATNI (FAS)</i> ... 1027</p> <p>Sanction for Prosecution—Offences committed in the Court of a Deputy Magistrate Transfer of same from the subdivision—Successor in office—Application for sanction to another Deputy Magistrate subsequently posted to the subdivision—Power of latter to grant sanction—Criminal Procedure Code (Act I of 1898) s 195 Where there are several</p>

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Deputy Magistrates at a place, and one of them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor in office of the outgoing Magistrate <i>Mohesh Chandra Saha v. Emperor</i> 1. L. R. 35 Cal 457, referred to Where a proceeding under s. 107 of the Code during the course of which a forged pottah was filed and evidence given in support thereof, was disposed of by H. K. G., a Deputy Magistrate, who became afterwards the officer next senior to the Subdivisional Magistrate, and on the transfer of the former, two other Deputy Magistrates became successively the next senior officers and ultimately K. L. M., a Deputy Magistrate joined the subdivision as the next senior officer, and an application was made to him for sanction to prosecute the petitioners for offences, under ss. 471 and 493 of the Penal Code committed in the Court of H. K. G. — <i>Held</i> that K. L. M. was not the successor in office of H. K. G. and had no power to grant sanction under the circumstances. <i>GIRISH CHANDRA RAY v. SARAT CHANDRA SINHA</i> (1914) 1 L. R. 42 Cal. .	667	See HINDU LAW—RELIGIOUS ENDOWMENT ...	536
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		Succession Certificate—<i>Succession Certificate Act (VII of 1889) s. 1—</i> <i>'Debt,' meaning of—Part of debt, if certificate can be granted in respect of—Appeal</i> A certificate under the Succession Certificate Act can be granted in respect of a part only of a debt due to the deceased. The word 'debt' is a comprehensive term, which should receive a liberal construction. <i>Re Ghansham Das</i> , (1893) All W. N. 84, and <i>Mahomed Abdul Hossain v. Sarifin</i> , 16 C. W. N. 231 approved and followed. <i>Albar Khan v. Bibi sara Begam</i> , (1901) All W. N. 125, considered. <i>Bibee Hoodhun v. Jan Khan</i> , 13 W. R. 265, <i>Muhammed Ali Khan v. Pattan Bibi</i> , 1 L. R. 19 All. 129, <i>Bismilla Begam v. Taucaul Hussain</i> , 1 L. R. 33 All. 335 and <i>Ghafur Khan v. Kalamdar Begam</i> 1 L. R. 33 All. 327 not followed. <i>ANNA PLENA DASEE v. NALINI MOHAN DAS</i> (1914) 1 L. R. 42 Cal. ...	10
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Summons—Service of summons—Indian Marine Service—Civil Procedure Code (Act I of 1908) O 1, rr 15, 17 and 27—Ex parte decree—Officer or mechanic in the employ of the Indian Marine Under the Civil Procedure Code an officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as any other person as regards service of summons. They come within the operation of rules 15 and 17 of Order V of the Code of Civil Procedure. <i>INDIA MEAN MISTRY v DARBUKH BULIAN</i> (1914) 1 L R 42 Cile	67	there being no statutory system of registration. Rights and liabilities in connection with trade marks are determined by reference to the principles of the common Law of England. <i>British American Tobacco Co, Ltd v Mahboob Buksh</i> 1 L R 38 Cile 110, referred to. A trade mark cannot be transferred or descend in gross but only together with the goodwill of the business to which it relates. A trade mark represents the origin of the goods to which it is attached or their trade association. The truth of the representation is essential. By virtue of successors in business may use their predecessors' trade marks where the representation still continues to be substantially true. A selector of natural products like jute may have a trade mark in connection with such selection as indicating good quality. <i>Major Brothers v Franklin & Son</i> [1908] 1 K B 712, followed. Meaning of 'goodwill' explained. <i>Indian Revenue Commissioners v Muller & Co v Margarine Ltd</i> , [1901] A C 217, referred to. In a suit for royalty brought by the licensors of certain jute trade marks against the licensee the defendants claimed that the plaintiffs had no title to the marks in question, and that the license was void.— <i>Held</i> that by virtue of s 117 of the Evidence Act the licensees were estopped from questioning their licensors' title or the validity of the license. At any rate s 117 cast on the defendants the burden of proving that the goodwill of the business had not passed to the plaintiffs to support the transfer of the trade marks and the defendants having failed to do so the plaintiffs were entitled to the royalty claimed. Claim to damages by the licensors for depreciation in the value of the trade marks due to the default of the licensee, refused on the facts of the case. The	
Surety—Rejection of sureties only on Police report without judicial enquiry into their fitness—Inquiry to be held by the Magistrate passing the order for security—Criminal Procedure Code (Act V of 1898) s 118 122 Sureties tendered by a party found down under s 118 of the Criminal Procedure Code should not be rejected on a police report as to their fitness but only after a judicial enquiry under s 122 and by the Magistrate who has passed the order for security. <i>AKBAR ALI MAHOMED v FAYEBOH</i> (1914) 1 I L 42 Cile	706		
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Title, proof of See FISHERY	489		
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Trade mark—Title—Assignment—Trade mark in selection of natural products as indicating quality—Goodwill—License to use trade mark—Action for royalty—Estoppel—Licensee estopped from questioning validity of license—Evidence Act (I of 1872) s 117—Damages act on for In India the law of trade marks is not governed by statute,			

Trade-mark—concl'd

decision of JUDGE in *Jagarrath & Co v Gresswell and Others* I L R, 40 Cal 814 affirmed HANNAH & JUDGE FRAYTH & Co (1914) I L R 42 Cal 6

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Trading with the Enemy—Acts done and directions given before date of the Ordinance relevant—Subsequent ratification—Trading meaning of—Directions to an agent to take delivery of goods lying in London, and to sell to German firm against payment—Supply of goods to agent and sale by him to German firm—Destined, meaning of—Legal and actual destination—Goods shipped to enemy country before the war but taken up by English firm in Italy—Exportation of goods to accused agent in Italy refused by such firm because of Royal Proclamation—Abetment of supply to or of trading by, the agent—Power of appellate Court to alter conviction of principal offence to one of abetment—Discretion of Court—Commercial Interference with the Enemy Ordinance (VI of 1914) s 3—Trading with the Enemy Proclamation No 2 of 1914 (9)—Royal Proclamation of 10th October 1914—Criminal Procedure Code (Act I of 1908) s 423 Where a case of trading was shipped by the accused to a German firm before the war but arrived in London after its outbreak and was taken up by an English firm which in the report before the date of the Ordinance VI of 1914, viz 14th October 1914 to a Bank in London to make over the case to the English firm, and later to the latter to take it up and send the same to his agent at Genoa on application of such agent which was made by the English firm to enable it to do so notwithstanding the prohibition of the export of mica to Italy by Royal Proclamation and further with the agent to apply to the English firm for the mica and to deliver it to a German purchaser

Trading with the Enemy—cont'd

against payment and where, after the date of the Ordinance the accused again wrote to his agent informing him of his aforesaid letters and instructions to the Bank and the English firm, and directing the agent to apply for the case of mica to the latter and to deliver it to the German purchaser against payment which directions were not in fact carried out on account of the refusal by the English firm to export the mica to Italy—Held that the Ordinance was not retrospective the only acts and directions which the Court could take into consideration, to establish the offence of trading with the enemy were such as were done or given after the date of its enactment unless the previous acts and directions were ratified thereby *Quere* Whether mere directions to an agent to apply for goods in the possession of a third person and to deliver the same to an enemy against payment amount to trading within the meaning of the Trading with the Enemy Proclamation No 2 of 1914 The word "destined" when used with the term "trading" in the same sub-clause, means "intended for" and not "on the way to" *Legal* destination must not be confused with *actual* destination The Court must determine whether the goods were actually destined for an enemy and with reference only to acts done and directions given after the date of the Ordinance VI of 1914 If the English firm had really purchased the goods outright, they were not in existence, so far as any disposition of them by the accused was concerned, after the date they were taken up and paid for, and could not be destined for an enemy But assuming that the said firm had merely taken over the goods on behalf of the accused and subject to his further instructions, a direction to the agent to apply

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	for and deliver them to a German purchaser against payment was insufficient to give the goods an enemy destination in fact, as such direction had no operation on receipt thereof by reason of the refusal of the English firm to export the goods to the agent at Genoa. <i>Held</i> , also, that, as the point was not free from doubt, the accused was entitled to the benefit of it. It is not a universal rule that in no case can an Appellate Court convict an accused of abetment, when he was charged only with the principal offence. But it is discretionary with the Appellate Court to allow such fresh charge being tried on appeal. The Court refused, under the circumstances of the case, to alter the conviction to one of abetment of supply to, or of trading by, the agent. Where the agent of the accused sold and delivered some cases of mica, and handed over the shipping documents for certain other cases lying in London, to a German firm or its agent in Genoa— <i>Held</i> , per BLACKCROFT AND GREAVES JJ, that the accused was guilty of the offence of supplying goods to the enemy within cl 5 (7) of the Trading with the Enemy Ordinance No 11. <i>INDAR CHAND & EMPEROR</i> (1915) I L L 42 Calo 1094	
	Trading with the Enemy Proclamation No. 2 cl 5 (7) (9): See TRADING WITH THE ENEMY 1094	
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	Civil Courts Act of 1887. <i>RUP KISHORE LAL & NEMAN BIBI</i> (1915) I L R 42 Calo 842	
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Trade mark—*concl'd*

decision of *MAN* in *Jagarnath & Co v. Cresswell and Others* 1 L R, 40 Cal 414 affirmed *HANNAH v. JUG PRNATH & Co* (1914) 1 L R 42 Cal

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Trading with the Enemy—*Acts done and directions given before date of the Ordinance* *relating to*—*Subsequent ratification*—*Trading*—*meaning of*—*Directions to an agent to take delivery of goods lying in London, and to sell to German firm against payment*—*Supply of goods to agent and sale by him to German firm*—*Destined*—*meaning of*—*Legal and actual destination*—*Goods shipped to enemy country before the war but taken up by English firm in England for exportation of goods to accused agent in Italy refused by such firm because of Royal Proclamation*—*Allegation of supply to or for enemy by the agent*—*Power of Syllite Court to alter conclusion of principal officer to one of alienation*—*Discretion of Court*—*Commercial intercourse with Enemy*—*Ordinance (VI of 1914) s 3*—*Trading with the Enemy Proclamation No 2 of 1914 (7)*—*Royal Proclamation of 15th October 1914*—*Criminal Procedure Code (Act I of 1898) s 423*—*Where a case of mica was shipped by the accused to a German firm before the war but arrived in India after its outbreak and was taken up by an English firm who upon the date of the Ordinance VI of 1914, viz 14th October 1914, took a Bank in India to make over the case to the English firm, and also to the latter to take it up and send the same to the agent at Genoa on application by such agent which, however, the English firm refused to do, it is not the probability of the export of mica to Italy by Royal Proclamation, and further we hold as it applies to the English firm for the mica, and to deliver it to a German purchaser*

Trading with the Enemy—*cont'd*

against payment and where, after the date of the Ordinance the ac-

and the English firm, and directing the agent to apply for the case of mica to the latter and to deliver it to the German purchaser against payment which directions were not in fact carried out on account of the refusal by the English firm to export the mica to Italy—*Held* that as the Ordinance was not retrospective, the only acts and directions which the Court could take into consideration, to establish the offence of trading with the enemy, were such as were done or given after the date of its enactment, unless the previous acts and directions were ratified thereby *Quare* Whether mere directions to an agent to apply for goods in the possession of a third person and to deliver the same to an enemy against payment amount to "trading" within the meaning of the Trading with the Enemy Proclamation No 2, cl 5 (7) The word "destined" when used with the term "trading" in the same sub-clause means "intended for" and not "on the way to *Legal* destination must not be confused with *actual* destination The Court must determine whether the goods were actually destined for an enemy and with reference only to acts done and directions given after the date of the Ordinance VI of 1914 If the English firm had really purchased the goods outright, they were not in existence, so far as any disposition of them by the accused was concerned, after the date they were taken up and paid for, and could not be destined for an enemy But assuming that the said firm had merely taken over the goods on behalf of the accused and subject to his further instructions, a direction to the agent to apply

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	for and deliver them to a German purchaser against payment was in sufficient to give the goods an enemy destination in fact as such direction had no operation on receipt thereof by reason of the refusal of the English firm to export the goods to the agent at Genoa <i>Held</i> also that, as the point was not free from doubt the accused was entitled to the benefit of it It is not a universal rule that in no case can an Appellate Court convict an accused of abetment when he was charged only with the principal offence But it is discretionary with the Appellate Court to allow such fresh charge when tried on appeal The Court refused under the circumstances of the case to alter the conviction to one of abetment of supply to or of trading by, the agent Where the agent of the accused sold and delivered some cases of mica and landed over the shipping documents for certain other cases lying in London to a German firm or its agent in Genoa — <i>Held per BEACHROFF AND GREAVES JJ</i> that the accused was guilty of the offence of supplying goods to the enemy within cl 5(7) of the Trading with the Enemy Ordinance No 2 UNDER CHANDLER EMPEROR (1915) I L R 42 Calc	
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Under raiyat Holding—concl'd

from the Transfer of Property Act, is not transferable, it cannot become so unless it is expressly made so by some other statute. If it had been intended to make holdings transferable which were before non transferable, the Legislature in framing the Bengal Tenancy Act would have said so. Section 117 of the Transfer of Property Act excludes agricultural land from the operation of the rule which makes leasehold property transferable. *Hiramoli Dassya v Annoda Prasad Ghose* 7 C L J 555, followed. *AMINABAI v JINABAI* AIR (1914) I L R 42 Cal.

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Under Tenure See **HOMESTEAD LAND** 638

Undue Influence See **INTEREST** 652 690

—**Contract—Illegal com-**
position of non compoundable offence
—**Suifing prosecution—Suit for re-**
fund—Contract Act (Act of 1872)
§ 19 19 No refund of money or
return of security given under
agreement not to prosecute a criminal
case, will be allowed unless
circumstances disclose fraud or
undue influence. Mere fear of
punishment in a criminal case
does not constitute undue influence.
Jones v Mertonethure Building
Society, [1892] I Ch 73 referred to
in *ANJALYNESHA BHOWLAH*
BOSE v SHIKHAR (1914) I L R 42
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Unity of Object See **MISJOINDER** 760

Various Interest See **INTEREST** .. 690

Usury : See **JURISDICTION** 116

Valuation of Suit : See **COURT FEE** 370

Vendor and Purchaser—Conveyance by
agent or as beneficial owner—Con-
struction of deed of sale—Inconsis-
tency between recitals and operative
part of deed—Omission to state ex-
pressly that he was conveying the
property sold in his capacity of ex-
ecutor. Held (reversing the appel-
late decision of the High Court,
and reversing that of the first

Vendor and Purchaser—concl'd.

Court), that on the construction of
a deed of sale, and on the evidence
in, and under the circumstances of
the case, the title vested in an ex-
ecutor passed to the appellants un-
der the deed, by which he
together with other vendors pur-
ported to convey 'all his estate,
right title, claim, and demand what-
soever in the property sold,
although he did not expressly state
therein that he was conveying the
property in his capacity as executor.
The plain legal interpretation of the
deed should not be allowed to be
affected by speculation as to what
particular rights existing in the
various vendors were present to the
minds of some or all of the parties
to the conveyance at the date of its
execution. The deed stated plainly
that whatever right or title the
vendors possessed was to go to
support the conveyance, and it is a
settled rule that the meaning of a
deed is to be decided by the language
used interpreted in a natural sense.
BIJRAI NOPANI v PURA SUNDARY
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THE
INDIAN LAW REPORTS,
Calcutta Series.

CIVIL RULE.

Before Wokerjee and Beachcroft J.

BALMER LAWRIE & Co

v

JADUNATH BANERJEE *

1914

April 6

Rateable Distribution—Practice and Procedure—Decree—Civil Procedure Code (Act V of 1908) ss 47 73—Civil Procedure Code (Act XIV of 1852) s 205—Appeal

An order refusing rateable distribution made under s 73 of the Code of Civil Procedure (Act V of 1908) between two rival decree holders which does not affect or interest the judgment debtor is an *order* in execution proceedings but is not a *decree* as all the conditions enumerated in s 47 of that Code are not present and consequently is not appealable

Jagdish Chandra Shaha v Kripaiah Shaha (1) followed

Sorabji Cooraji v Kala Raghunath (2) distinguished

It is essential for the application of s 73 of the Code of Civil Procedure that the decrees should have been *passed* against the same judgment debtor

RULE obtained by Messrs Balmer Lawrie & Co the petitioners

The petitioners had got a decree against D Mukherjee & Co in the Small Cause Court, Calcutta,

* Civil Rule No 132 of 1914, against the order of Lata Behari Bose Subordinate Judge of 24 Parganas dated Jan 27 1914.

(1) (1908) I L R 36 Calc 130 (2) (1911) I L R 36 Bom 156

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for a sum of Rs 1500 including costs. And in execution thereof in that Court got satisfaction to the extent of Rs 500 only, iterably along with other creditors from a sum of Rs 1200 sent to the Small Cause Court Calcutta by the Chairman of the Calcutta Municipal Corporation alleging that that was the only sum payable by the said Municipality to D Mukherjee & Co.

Thereafter it appears that Jadunath Banerjee, the decree holder opposite party executed his decree against D Mukherjee & Co in the said Court of the Subordinate Judge Alipore in execution case No 79 of 1913 and attached two Government promissory notes Nos 009497 and 131160 of the $3\frac{1}{2}$ per cent loan of 1842-43 for Rs 500 and Rs 200 respectively and also any money due from the said Corporation to D Mukherjee & Co. The said Chairman then sent to the Subordinate Judge the aforesaid Government promissory notes and a cheque for Rs 52378 representing the judgment-debtor's dues from the said Corporation on accounts subsequently taken, all of which were still lying with him unencashed, and also mentioned the fact of there having been previous attachments from the Small Cause Court Calcutta of D Mukherjee & Co's dues by a number of creditors as well as the fact that the said Chairman had sent Rs 1200 to the Small Cause Court Calcutta.

Thereupon the said Court of the Subordinate Judge, Alipore sent to the petitioner notice of the execution case No 79 of 1913. And they entered appearance, took time and finally on the 10th January 1914 after having transferred the decree from the Small Cause Court Calcutta to the said Court of the Subordinate Judge Alipore filed a petition for execution praying for attachment of the aforesaid Government promissory notes and cheque and rateable distribution along

with other creditors after realisation. On the 27th January 1914, the learned Subordinate Judge, after hearing the parties, rejected the petitioner's application holding that they were not entitled to get rateable distribution. Hence they moved the High Court and obtained this Rule.

Babu Biraj Mohan Majumdar, for the opposite party. I have a preliminary objection to take, namely, that as there is an appeal from an order refusing rateable distribution, no Rule should have been granted under s. 115 of the Code of Civil Procedure; vide *Sorabji Coorvarji v. Kala Raghunath* (1).

[MOOKERJEE J. How do you say there is an appeal?]

As the question is between parties to the suit, the order should fall under s. 47 of the Civil Procedure Code, and hence there is an appeal.

"Assets" in the present section has the ordinary meaning attached to the word and therefore the "assets" of the judgment-debtor in the present case were received by the executing Court on the day on which the promissory notes and the cheque for Rs. 523 were sent by the Secretary, Municipal Corporation, to the Court. This was long before the petitioners applied for rateable distribution, and hence they are out of time.

[BEACHCROFT J. Have the promissory notes been endorsed over to the opposite party, and has the cheque been cashed?]

[*Babu Sajani Kanta Sinha*, for the petitioner. No, the cheque has not been cashed, but the Government promissory notes have been endorsed over to the opposite party Jadunath on the very day on which this rule was issued by your Lordships. There appears to have been an undue haste about it.]

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They are entitled to the money and they have taken it. At any rate the order for rateable distribution was passed in December.

[BEACHCROFT J. How could that be? How could the Court have distributed the Government promissory notes without selling them? Suppose the property was immoveable property instead of Government promissory notes.]

At any rate, the decree was not against the same judgment-debtors. One was against the firm and the other against Darsarathi Mukherjee.

Babu Sayam Kanta Sinha, in support of the Rule. The Rule is in order. No appeal lies from an order under section 73 refusing rateable distribution. It is not an order under section 47, the question not being between the decree-holder and the judgment-debtor but between different decree-holders against the same judgment-debtor. The case of *Sorabji Coovary v Kala Raghunath*(1) is distinguishable. There the question was whether the sale held of the properties of the judgment-debtor in spite of the payment of the whole of the decretal amount for which the properties had been attached, was valid or not. This was a question undoubtedly between the judgment-debtor and the executing creditor. The case here is entirely different. Hence the ruling is quite inapplicable.

'Assets' to be held by a Court must be realised before they are assets within the meaning of section 73 of the new Code or section 295 of the old Code. There can be no distribution of the properties of a judgment-debtor amongst creditors before they are "realised," and "realisation" has been held to mean "converted into cash or such form as to be available for immediate distribution." *Ramanathan Chettiar*

v. *Subramania Sastri* (1), *Hafiz Mahomed v Damodar Pramanick* (2)

[MOOKERJEE J But the old section 295 has been considerably changed. In the old Code, the words were, when "assets are realised", whereas in the new Code, they are, "assets are held". Therefore the real question is about the meaning of "assets"]

No doubt "assets" in the broad sense of the word would mean property of a person that can be made liable for his debts, but this must be taken with the word *held*, i.e., held in such a form as can immediately be distributed to the creditors in satisfaction of a decree for money.

[MOOKERJEE J Your contention is that it must be converted into cash.]

Yes, or some form which is equivalent to cash.

[MOOKERJEE J What is that?]

Currency notes or some such thing.

[MOOKERJEE J Suppose the assets brought into Court are paddy. Is that something available for immediate distribution?]

No, the decree sought to be executed must be one for money and therefore the satisfaction must be in money. This is the import of the decisions in *Ramanatham v Subramania* (1) and *Hafiz v Damodar* (2).

[MOOKERJEE J Those are cases under the old Code. Have you got any case decided after the passing of the new Act?]

Yes. *Arimuthu Chetty v Vyapuripandaram* (3). It is a decision of a single Judge of the Madras High Court and shows that Mr Justice Abdul Rahim thought that 'assets' under the new Code must be realised before they can be held by a Court. The

(1) (1902) I L R 26 Mad 179

(2) (1891) I L R 18 Calc 242

(3) (1911) I L R 35 Mad 588

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Government promissory notes and the cheque are negotiable instruments and there are special provisions in the Civil Procedure Code for their realisation see Order XXI rules 51 and 76 The Government promissory notes and the cheque were brought into Court but there was something more to be done under Order XXI rule 76 The endorsement of the Government promissory notes over to one of the decree holders is illegal at any rate irregular Hence the Court below never realised the property brought into Court under attachment So it did not hold the assets within the meaning of section 73 before the application for execution and rateable distribution by my client Therefore the order complained of is wrong

As for the decrees not being against the same judgment debtor Disarathi Mukherjee is the sole partner of D Mukherjee & Co at any rate is a partner who is personally liable for the debts of the Company therefore the contention of my learned friend is groundless The real test is whether the person whose money is sought by different creditors under different decrees for money is liable under each of the decrees : *Gonesh Das Bagri v Shiva Lakshman Bhatia* (1)

[MOOKERJEE J But the word "passed" is an addition in the new Code]

No doubt but it is an addition necessary under the new framing of the section It does not affect the use of the old section 29 with regard to the judgment debtor A decree against A B and C jointly and severally is a decree passed equally against A B and C Therefore a decree against D Mukherjee and Co is a decree passed against Disarathi Mukherjee as well as against any other member of the firm, if any

MOOKERJEE AND BEACHCROFT JJ. This Rule is directed against an order by which the Subordinate Judge has refused an application for rateable distribution under section 73 of the Code of Civil Procedure of 1908. The opposite party obtained a decree for money against his judgment-debtor by name Dasarathi Mukherjee, while the petitioner obtained a decree for money against D Mukherjee & Company, a firm of which Dasarathi Mukherjee was a partner. At the instance of the decree-holder opposite party, the Municipal Corporation of Calcutta, which held two Government securities and a sum of money payable to Dasarathi Mukherjee, placed the properties at the disposal of the lower Court for satisfaction of the decree held by him. During the pendency of a proceeding for rateable distribution as between the opposite party and the other execution creditors of Dasarathi Mukherjee, at whose instance the properties in the custody of the Corporation had been attached through the Calcutta Small Cause Court, the present petitioner, on the 15th January 1914, made an application for rateable distribution. This application has been refused by the Subordinate Judge on the ground that it was made after the receipt of the assets by the Court. The question for consideration is, whether this order has been rightly made.

A preliminary objection has been taken to the Rule on the ground that the order of the Subordinate Judge was in essence made under section 47 of the Code and was appealable as a decree. In support of this view, reference has been made to the case of *Sorabji Coovaji v Kala Raghunath* (1). That case, however, is clearly distinguishable. There the decree-holders had attached the property of their common

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judgment-debtor. Other execution creditors of the judgment-debtor applied for rateable distribution of the assets which might be realised by sale of the property. The judgment-debtor brought into Court a sum sufficient to satisfy the two decree-holders at whose instance the property had been attached. Thereupon the other decree-holder applied for rateable distribution of the sum so deposited, and the Court, without notice to the judgment-debtor, allowed this application. The result was that there was not a sufficient sum left to the credit of the decree-holders, at whose instance the attachment had been effected, to satisfy their dues, and the Court accordingly directed that the property attached be sold in order that their decrees might be satisfied in full. The judgment-debtor appealed against this order, on the ground that no rateable distribution was permissible under the law in respect of the money brought by him into Court, and that as the sum deposited was sufficient to satisfy the decrees held by the two execution creditors who had taken out processes of attachment, their decrees must be deemed in law to have been satisfied, so that there was no execution proceeding left in which an order for rateable distribution might be made. An objection that the appeal was incompetent as the question raised was not within the scope of section 17, was overruled on the ground that the question did arise between parties to the decree. It is not necessary for our present purpose to decide whether, in circumstances like these, the question which arose not merely between the rival decree-holders but also between the judgment-debtor on the one hand and the decree-holders on the other, could be deemed to fall within the scope of section 17. But it is plain that, in the case before us, the question which calls for decision is not within the scope of

that section This is not a question which arises between the parties to the suit in which the decree under execution was passed, it is on the other hand a question between two rival decree-holders, which does not affect or interest the judgment-debtor. An order made under section 73 is an order in execution proceedings but is not a decree unless all the conditions enumerated in section 47 are present. *Jagadish v. Kripa Nath*(1). We must consequently hold that the order of the Subordinate Judge is not appealable and overrule the preliminary objection.

As regards the merits, it is plain that the petitioner is not entitled to succeed. Section 73 provides that where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons. It is essential for the application of the section that the decrees should have been passed against the same judgment-debtor. This has been made clear beyond possibility of dispute by the introduction of the word "passed" which did not find a place in section 295 of the Code of 1882. But, as already stated, the decree held by the opposite party, in execution of which the properties have been brought into Court, was passed against Dasrathi Mukherjee, while the decree held by the petitioner was obtained against the firm of which Dasrathi Mukherjee was a partner, and is not shown to be capable of execution against him individually. Consequently, the two decrees cannot be deemed to have been passed against the same judgment-debtor, and it

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is thus needless to consider whether *Gonesh Das v. Shiva Lakshman* (1) has been affected by section 73 of the Code of 1908 which reproduces section 295 of the Code of 1882 in an altered form. In this view, it is also unnecessary to discuss the question whether the application for rateable distribution by the petitioners was made before the assets had been received by the Court below.

The result is that the Rule is discharged with costs to the decree-holder (and not to the judgment-debtor) opposite party.

O S

Rule discharged

(1) (1903) I I R 30 Cal 589

APPELLATE CIVIL.*Before Woodroffe and Carcliff JJ***ANNAPURNA DASDE**

v

NALINI MOHAN DAS*

*Succession Certificate—Succession Certificate Act (VII of 1880) s 4—
 Debt—meaning of—Part of debt if certificate can be granted in
 respect of—Appel*

A certificate under the Succession Certificate Act can be granted in respect of a part only of a debt due to the deceased.

The word debt is a comprehensive term which should receive a liberal construction.

Re Ghansham Das (1) and *Mahomet Abdul Hossain v Sarifan* (2), approved and followed.

Ikbar Akbar v Bilasara Begum (3) considered.

* Appellate from Order No 328 of 1913 from the order of Mr. Sutherland, District Judge of Dacca dated June 23 1913.

(1) (1893) All W N 111

(2) (1911) 11 C. W. N 211

(3) (1911) All W N 127

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 April 8

Bibee Hoodhun v Jan Khan (1), *Muhammed Ali Khan v. Paltan Bibi* (2) *Bismilla Begam v Tauratul Husain* (3) and *Ghafur Khan v. Kalindari Begam* (4) not followed

1914

ANNAURNA
DASFFP.
NATINI
MOHAN DAS

APPEAL by Annapurna Dasee from an order of the District Judge of Dacca dismissing the petition of the appellant for a certificate under the Succession Certificate Act empowering her to receive the interest on certain Government promissory notes and the dividends on certain Bank of Bengal shares.

The appellant was the widow and heiress of one Sanatan Das, who died on February 21th, 1902. Part of the estate of the deceased consisted of certain Government promissory notes and Bank of Bengal shares, and upon these there was due, by way of interest and dividends at the date of the death of the deceased, a sum of Rs. 4,963-10-4. On April 25th, 1913, the appellant presented a petition for a succession certificate in respect of this sum without asking either for payment of interest and dividends accruing between the date of the deceased's death and the date of the petition or that the promissory notes and shares should be made over to her. The District Judge dismissed the petition. Hence this appeal

Mr S P Sinha, Dr Rash Behary Ghose, and Babu Upendra Lal Roy, for the appellant

Mr. B. Chakravarti, Mr. B. C. Mitter, Babu Bepin Chandra Mullick and Babu Suresh Chandra Das, for the respondents

Cur. adv. ault.

WOODROFFE J. This appeal arises in connection with an application which has been made for a succession certificate.

(1) (1870) 13 W R 265

(3) (1910) I L R 32 All 335

(2) (1896) 1 L R 19 All 129

(4) (1910) I L R 33 All 327

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The deceased Sanatan Das died leaving Government promissory notes and Bank of Bengal shares on which Rs. 4,000 odd were due for interest at the time of his death, and since his death over Rs. 75,000 as further interest have fallen due. The application is by his widow for a certificate which will enable her to realise interest and dividends due up to the date of her husband's death but not the interest and dividends falling due after his death, or the principal. The object of the application apparently is that the applicant may thereby be exempted from finding a large security which she would have to find if a certificate were applied for in order to recover the principal, interest and dividends accruing both before and after the death of her husband.

The learned Judge was of opinion that the certificate, as asked for could not be granted. He says: "The law intends that in fit cases security should be taken to protect such claims. The present peculiar limitation is intended to evade the giving of any such security. I am not prepared to make the limited grant prayed for. In the absence of any valid objection by the objector, whom I have not yet heard, I am prepared to make a grant in the ordinary way of power to realise dividends and interest, not limited to a particular date, but generally such as fall due on proper security being given. I find nothing to indicate that it was intended that power should be given to realise dividends for a very short period only, the provisions are for granting power to realise dividends: and practically apart from the question of law there is no good reason for so limiting a grant. I decline to make the limited grant prayed for in all the circumstances. Subject to what I may hear from the other side, I will make a grant in the ordinary way on proper security being given, and not one to enable the applicant to

draw Rs 4,000 odd with security and Rs. 75,000 odd at present and more in the future without security."

A preliminary objection has been taken by the respondent that no appeal lies on the ground that the order which I have just read was not a final order from which an appeal would lie. In my opinion, however, there is no force in this contention. There was a final order namely, that portion of the order in which the Judge says that he declines to make the grant prayed for. It is true that he went further and said that he would be prepared to make another grant different from that which he had refused, but that was an expression of opinion as to what he was prepared to do under different circumstances and did not affect the finality of the order which was passed. He refused to grant the application prayed for merely adding as a rider, which in effect was unnecessary that if another application was made in a different form he would consider it. In my opinion, therefore, the preliminary objection fails and an appeal lies. The question we have to consider is as to the merits of this application. There is a ground which has been taken in appeal that the learned District Judge should have held that Act VII of 1889 had no application to the interest and dividends falling due after the death of the appellant's husband, it being contended in such grounds that such interest and dividends were a debt not due to the deceased but due to his widow, the present applicant, and that therefore the petitioner was not bound to include the interest and dividends in the present application. On the other hand, it has been contended that the principal sum was a debt due to the deceased even though it may have been payable after his death and that the rule governing the grant of a certificate to recover such principal applies not only in respect of the interest earned by

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such principal before the death of the deceased but also after his death. It is however unnecessary in the present case to consider this point because I think that the appeal may be dealt with upon the other grounds to which I am now about to refer.

The question which we have to decide is whether a certificate can be granted for the recovery of a part of a debt. It appears to be well established that a separate certificate may be granted in respect of separate debts and that there is nothing in law which compels the applicant for such a certificate to apply for a certificate in respect of all the debts due to the deceased. But the question which is now before us is this: whether assuming that to be so we can go further and hold that as regards a single debt, a certificate can or cannot be granted for the purpose of enabling the applicant to recover a portion of that debt. The word debt is a comprehensive term which I think should receive a liberal construction. The object of the Act is to protect the debtors of a deceased person but there is nothing in law which prevents a debtor from making payment of his debt without the production of a certificate if he so chooses. Now, the first point from which the matter may be looked at is that of authority, it being contended by both sides in this appeal that the Case law supports the respective contentions which they have placed before us and there are decisions which may be cited in support of either of these contentions.

The earliest decision to which we have been referred is *Mussamat Bibee Boodhun v Jan Khan* (1). In that case Mussamat appealed against an order granting Tin Ali a certificate to collect five sixths of the debts due to the estate of Zuhur Ali and the learned Judge said: "Now we observe at the outset of the

case that this order is irregular. Act XXVII of 1860—that is the old Succession Certificate Act—does not contemplate a division of a certificate or a power to collect fractional shares of debts” This passage favours the respondent’s contention and indeed goes the whole way which he desires us to go; but the statement there made was a mere expression of opinion. It does not appear to have been the subject of discussion or argument and was unnecessary seeing that the suit in which it was given was not heard but was compromised

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In the case of *Muhammad Ali Khan v. Puttan Bibi* (1), it was held by Sir John Edgeworth C. J. and Burdett, J. that a certificate for collection of debts under Act VII of 1889 may be given for the collection of any one or more separate debts of the deceased, but not for the collection of part only of a debt. The ground upon which the learned Judges appear to have based their decision was that a contrary view might lead to a multiplicity of suits and the harassment of debtors.

This case was followed by that of *Bismulla Begam v. Tawassul Husain* (2) in which it was held that no certificate could be granted to one of the heirs of a Mahomedan lady who had died leaving a dower debt unrealised for collection merely of a part of the dower debt of the deceased. It was also followed by the decision in *Ghaffur Khan v. Kalandari Begam* (3), in which it was held that no certificate could be granted to one of the heirs of a Mahomedan lady, who had died leaving her dower debt unrealised, for collection merely of a part of the dower debt of the deceased. There again, the decision was based on the ground that a debtor is not to be harassed more than once for one debt and a multiplicity of

(1) (1896) I L R 19 All 129 (2) (1910) I L R 32 All 335

(3) (1910) I L R 33 All 327

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suits in respect of one cause of action should be discouraged and on the ground that the word 'debt' must be taken to mean the whole of the debt due to the deceased and not a portion or share of such debt. It was considered that the latter view was opposed to the scheme of the Act which had been enacted to afford protection to debtors and had nothing to do with the convenience of the applicant or his right to or share in the debt.

Precious however to this there appears to have been a conflict even in the Allahabad High Court on this point, for in the case of *Akbar Khan v Bil kisara Begam* (1) Chrimie J doubted the correctness of the decision in *Muhammad Ali Khan v Puttan Bibi* (2) and was of opinion that the word 'debts' in section 6 (f) of the Succession Certificate Act means debts due, i.e. alleged to be due from debtors to the person applying for the certificate.

Further in *re Ghansham Dns* (3) Blair J gave a decision which directly supports the contention of the appellant before us holding that there was nothing in the Succession Certificate Act of 1889 to preclude a Judge from granting a certificate for partial collection of the debts of a deceased person security being furnished by the applicant of proportionate amount. He therefore says there seems to be no practical objection to the issue of a certificate for partial collection inasmuch as the Act itself contemplates the addition to a certificate of debts to which it did not originally apply.

I further the latest case and it is one in our Court supports the view which we have been asked to accept by the appellant. That case is *Muhammed Abdul Hossain v Sarifsa* (4) and was decided by

(1) (1901) 17 W N 175

(3) (1893) 11 W N 84

(2) (1890) 11 I R 19 All 129

(4) (1911) 16 C W N 231

Mookerjee and Carnduff, JJ. There the Court dissented from the decision in *Ghafur Khan v. Kalandari Begam* (1) and held that section 4 of the Succession Certificate Act does not require that the certificate should cover the whole of the debt, if the heirs do not seek to realise the whole. This was a case in which one of several heirs of a deceased Mahomedan lady sued her husband for a portion of the share of the deferred dower due by the defendant to the deceased relinquishing the balance. It was held that in respect of the deferred dower, each of the heirs of the deceased had a distinct right enforceable by himself, though all might jointly sue and that it was open to each to relinquish a portion of the claim. It was also held that an application by the plaintiff for a succession certificate in respect of the amount claimed by her in the suit was properly granted. No doubt, the circumstances of that case were not exactly the same as those before us, but the principle upon which the decision proceeds seems applicable to the present circumstances, for the debt due to the deceased was one debt and yet it was held that a partial certificate might be granted to one of several of the heirs to recover the portion of that debt which he claimed. And if this may be done, I do not see in principle why a person may not, as in this case apply for a certificate to enable him to recover a portion of a debt due to the deceased. The matter appears to be one which rather affects the question of revenue than anything else. But there does not appear to me to be as Blair J points out, any practical objection to the grant of such a certificate which may be, as in the present case, a distinct convenience to the applicant.

As regards the objection which has been taken that such a procedure may lead to a multiplicity of

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suits, the answer appears to me to be two-fold. In the first place if the debt be due and the debtor be honest and solvent he will pay on the production of the certificate for the grantee of the certificate can give him a valid discharge to the extent indicated by the instrument. There will then be no necessity for a suit and the question of multiplicity upon which the learned Judges of the Allahabad High Court proceed, will not arise at all. Next, if there is such a suit it by no means follows that, because a certificate may be given to recover a fractional share of a debt, the principle of law which prohibits multiplicity of suits, is in any way affected. We must distinguish between two separate things, one is the grant of a certificate and the other is the institution of the suit. We are not here concerned with the frame of a suit but whether a certificate should be granted, and it may well be that though a certificate may be granted to recover a fractional share of a debt yet if the person to whom the certificate was granted were to sue for a portion of a debt which he might have sued for in a previous suit his claim would be barred under the provisions of the Civil Procedure Code.

I am of opinion therefore that both on the ground of principle and of the authorities to which I have referred and which support the contention of the appellant this appeal should succeed, I therefore would reverse the order of the District Judge rejecting the application for a certificate in the terms prayed for by the appellant and remand the case to him for a rehearing.

The respondents will pay the appellant's costs of this appeal.

CARNDUFF J. I agree

H R P

Appeal allowed, case remanded.

CRIMINAL REFERENCE.

*Before Sharfuddin and Coxe J.*1914
April 21

ABHAYESWARI DEBI

v.

KISHORI MOHAN BANERJEE.*

Complaint—Personal presentation of complaint—Complaint of defamation presented by alleged agent of pardanashin but not signed by her—Power of attorney not filed in Court—Necessity of examination of complainant before issue of process—Examination of pardanashin on commission—Criminal Procedure Code (Act V of 1898) s. 193, 200, 503—‘At once’

The words ‘at once’ in s. 200 of the Criminal Procedure Code clearly indicate that a complaint must ordinarily be presented in person; otherwise a Magistrate should be very loath to take cognisance and should not accept a complaint not signed by the alleged complainant, and not preferred by a person duly authorized to institute the specific complaint.

No process can be issued against the accused, either by the Magistrate first taking cognisance or by the Magistrate to whom the case is transferred, unless and until the Magistrate issuing it has first examined the complainant, and this course is the more necessary in the case of a *pardanashin* to enable the Magistrate to satisfy himself that the complaint is really her action.

When a *pardanashin* makes a complaint the Magistrate may take cognisance, if satisfied that it is really her complaint by whatever means it reaches him.

When it is presented on her behalf, the Magistrate may, under s. 503 of the Code, issue a commission for the examination required by s. 200. Section 503 is very wide in its terms and refers not only to an inquiry or trial but to any other proceeding and authorises the examination of any ‘witness’ which includes a complainant.

* Criminal Reference No. 1 of 1914 by H. H. Chatterjee, 4th Presidency Magistrate, Calcutta, dated March 25, 1914.

1914

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Where a written complaint of defamation was presented by an alleged agent on behalf of a *pardanashin*, but it was not signed by her, nor was any power of attorney filed before the Magistrate, and he issued process without examining the complainant

Held that he had no power to issue process in such a case

THIRF appeared in a weekly newspaper called the "*Indian Empire*" printed and published in the town of Calcutta a series of articles reflecting on the management of the Bijnai Raj under the present *Rani*, Abhayaeswar Debi who resided in the Goalpara district in Assam. On the 6th November 1913, one Bhubin Mohan Chatterjee, Assistant Superintendent of the Bijnai estate, presented a complaint before the Chief Presidency Magistrate, purporting to be made on behalf of the *Rani*, and as her constituted agent, against Kishori Mohan Bandyop and others, the editor and the printer of the said newspaper, charging them with defamation under s. 500 of the Penal Code. The petition of complaint was signed by Bhubin but not the *Rani* and no power of attorney was filed in Court. The Magistrate issued process, without examining the lady and transferred the case thereafter to the Second Presidency Magistrate who examined several prosecution witnesses, but refused to issue a commission for her examination. On application by her to the High Court, the case was transferred to the Chief Presidency Magistrate who sent it to Babu R. D. Chatterjee for disposal.

On the 24th March 1914 when the case was called on for hearing the counsel for the accused objected to the trial proceeding on the ground that, under s. 198 of the Criminal Procedure Code, a complaint by the *Rani* was necessary, and that there was nothing to show that the petition presented by Bhubin was her complaint, there being no power of attorney on the record. The Magistrate thereupon referred the

case, under s. 432 of the Code, to the High Court, through the Registrar, in the following terms —

"Under section 432, Criminal Procedure Code, I beg to refer the following point of law to you for submission to the Honble Judges of the High Court for decision. A case of defamation (section 500, I P C) was instituted in the Court of the Chief Presidency Magistrate of Calcutta on the 6th November 1913 on behalf of Rani Abhayeswari Debi, Rani of Bijnor, through her constituted attorney Bhubin Mohan Chatterjee Assistant Superintendent, Bijnor Raj against Kishori Mohan Benerjee and others. The petition was signed by Bhubin Mohan Chatterjee on behalf of Rani Abhayeswari Debi of Bijnor and not signed by the Rani. No power of attorney has yet been filed in this matter.

On the case being called up to day (24th March 1914) the defence counsel wanted *de novo* trial and contended that as the Rani who is alleged to have been defamed, did not lodge the complaint herself but did so through one Bhubin Mohan Chatterjee who was represented in the petition as her constituted agent, the complaint could not be said to have been made by the party aggrieved and as such, under section 198 Cr P C, the case cannot go on. As this point is not free from difficulty, I submit the record of the case to you for lying before the Honble Judges of the High Court for their decision on the following point — Whether the Rani can institute the case of defamation through her agent Bhubin Mohan Chatterjee, and whether by doing so the requirements of section 198 Cr P C, have been met with.

The whole record of the case including the petition of complaint is submitted for their Lordships' decision.

Mr. H. N. Sen (with him *Babu Tarkesswar Pal Chowdhury*), for the accused. The Chief Presidency Magistrate has no jurisdiction, by reason of s. 198 of the Code, to take cognisance, except on the complaint of the person aggrieved viz., the Rani. *see* s. 345. The petition of complaint was not signed by her nor was any power of attorney filed by Bhubin. Refers to *Chhotalal Lalubhai v. Nathabhai Bechar* (1), *Thakur Das Sar v. Adhar Chandra Misra* (2), *Satya Charan Ghose v. Chairman of the Uttarpara Municipality* (3), *Kesri v. Muhammed Bakhsh* (4) and

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(1) (1900) 1 L R 25 Bom 151

(3) (1897) 3 C W N 17

(2) (1904) 1 L R 32 Cal 425

(4) (1896) 1 I L R 18 All 221

1914

ABHAYES
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Rangasawmi Gounden v. Sabapathy Gounden (1). There is no evidence of Bhuban's authority to file the present complaint: *Kali Kinkar Sett v. Nritya Gopal Roy* (2). The power of attorney must show not general authority to prosecute, but authority to file the particular complaint: Mackenzie on Powers of Attorney, p. 33. There is nothing to show that that complaint was really the act of the lady and not that of others acting under the colour of her name.

Mr. J. N. Roy (with him *Babu Manmatha Nath Mukerjee*), for the complainant. As the Magistrate has already issued process and transferred the case, the accused cannot now complain of the want of jurisdiction. The person presenting the complaint has a general power of attorney to institute criminal prosecutions. The lady ought to be examined on commission.

COX: J. This proceeding arises out of a complaint, purporting to be made on the part of Rani Abhayeswari Debi against the petitioners, accusing them of committing defamation. The complaint is not signed by the *Rani*, but by one Bhuban Mohan Chatterjee on behalf of the *Rani*. We are informed that there is no power of attorney on the record, and that there is no power of attorney authorizing the presentation of this specific complaint, although there is a general power of attorney authorizing the presentation of criminal complaints. The document was presented to the Chief Presidency Magistrate, who issued process against the accused; and thereafter the case was transferred. The Magistrate, to whom it has ultimately come, has referred for our decision the following point—"Whether the *Rani* can institute the case of defamation through her agent, Bhuban Mohan Chatterjee, and whether by

doing so the requirements of section 198 of the Criminal Procedure Code have been met with

If the *Ram* made a complaint to a Magistrate the Magistrate is entitled to take cognizance of it. But before he takes cognizance he must be satisfied that it is her complaint. It is comparatively unimportant by what means the complaint reaches the Magistrate if really it is her own complaint.

But I hold that the Magistrate should be very loath to take cognizance of any complaint which is not presented in person. The words at once in section 200 of the Code clearly indicate that ordinarily a complaint must be presented in person. And I do not think that a complaint should ever be accepted which is not signed by the complainant and is not preferred by a person duly authorized to prefer that specific complaint.

It is perfectly clear to me that the Magistrate in the Court below had no right to issue process against the accused persons in this case. It has been argued that when a case is transferred under section 192 of the Criminal Procedure Code before the complainant has been examined process can issue without the examination of the complainant. That argument really has no application to the present case because it is a matter of fact process had been issued before the case was transferred. But in any case it is perfectly well settled that a process cannot be issued against an accused person either by the Magistrate first taking cognizance of an offence or by the Magistrate to whom the case is transferred under the proviso to section 200 of the Criminal Procedure Code unless and until the Magistrate issuing process has first examined the complainant and this is perhaps more necessary in the case of a *pudnashin* lady than in other cases to enable the Magistrate to satisfy himself that the

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complaint is really her own action. In the present case if the complaint is ill-founded, it would be difficult, if not impossible, to fix the *Rani* with any responsibility for the proceeding.

I see no reason, however, why the complainant should not be examined under section 503 of the Criminal Procedure Code. The terms of that section are very wide. They refer not only to an enquiry and a trial but to any other proceeding. The section authorizes the examination of any witness, and a complainant is certainly, in my opinion, a witness. There is, indeed, less objection to the first examination of a complainant than to the examination of a witness under this section, inasmuch as, on the examination of a complainant before process is issued, the accused is not entitled to be present or to cross examine.

It seems to me therefore, that the proper course to adopt in this case is to say that, if the complaint on the record is the complaint of the *Rani*, a point on which we have no materials for a decision, the requirements of section 195 have been satisfied. But the Magistrate was wrong in issuing process against the accused persons. In these circumstances it is best to quash the whole proceedings, giving liberty to the *Rani* to make such further complaint as she may be advised. If such complaint is made, the examination of the complainant under Chapter XVI of the Code may be made by a commission, which should be directed to a Magistrate.

SHARFUDDIN J. I agree.

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CRIMINAL REVISION.

Before Holme and Sharfudin JJ

ASHRAF ALI

v.

EMPEROR *

1914

April 23

Bail—Grounds of admission to bail—Confession of a co-prisoner materially corroborated as to applicant—relative powers of the High Court and Subordinate Courts to grant bail Criminal Procedure Code (Act I of 1898) ss 497 and 498

Section 497 of the Criminal Procedure Code contains a rule founded on justice and equity and should be followed by the High Court, unless any thing appears to the contrary. The extended powers given to the latter by s 498 are not to be used to get rid of the reasonable and proper provision of the law laid down in s 497.

The High Court refused bail where a confession by a co-accused implicating himself and the petitioners was materially corroborated as to the latter by other evidence taken at the preliminary enquiry into offences under ss 307 and 337 of the Penal Code.

ON the night of the 25th January 1914, the house of F.W Higgins, a tenant who lived with his son in the interior, about 19 miles from the town of Chittagong, was raided by 13 men with the object of plundering a safe containing Rs 2,000. One of them, named Niyamat Ali, was seized on the spot and made a confession implicating himself and the present petitioners, Ashraf Ali and others. Warrants were issued against them and they surrendered in the early part of February. The charge-sheet in the case was submitted on the 6th March, and the preliminary enquiry commenced on the same day. The

* Criminal Miscellaneous No 60 of 1914 against the order of the Sessions Judge of Chittagong, dated March 21, 1914.

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It seems to me therefore that the proper course to adopt in this case is to say that if the complaint on the record is the complaint of the *Rani*, a point on which we have no materials for a decision, the requirements of section 198 have been satisfied. But the Magistrate was wrong in issuing process against the accused persons. In these circumstances it is best to quash the whole proceedings, giving liberty to the *Rani* to make such further complaint as she may be advised. If such complaint is made, the examination of the complainant under Chapter XVI of the Code may be made by a commission which should be directed to a Magistrate.

SHARFUDDIN J. I agree.

F. H. M.

CRIMINAL REVISION.

Before Holme and Sharfuddin JJ

ASHRAF ALI

v

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1914

April 23

Bail—Grounds of admission to bail—Confession of a co-prisoner materially corroborated as to applicant—Relative powers of the High Court and subordinate Courts to grant bail—Criminal Procedure Code (Act I of 1898) ss 497 and 498

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* Criminal Miscellaneous No 60 of 1914, against the order of the Sessions Judge of Chittagong, dated March 21 1914

of material corroboration at law and from the account which has been placed before us by the learned counsel appearing in support of the Rule we must say that so far as it goes it is what the law considers material corroboration. Of course we do not and we should not think of throwing out any opinion as to whether this evidence is to be believed. We do not desire to prejudice the case in any way. We merely state that the evidence which is put before us through the learned counsel is if believed evidence which in law amounts to material corroboration and we think that the rule laid down in section 497 for the guidance of Courts other than the High Court is a rule founded upon justice and equity and one which should be followed by us as well as by every other Court unless any thing appears to the contrary. The extended powers given to the High Court under section 498 are certainly not to be used to get rid of this very reasonable and proper provision of the law.

For these reasons we think that at the present stage of the case bail should not be given. It will of course be within the competence of the lower Courts to admit the petitioners to bail at any time after Mr Higgins is examined or whenever it should appear that the *prima facie* case against them has in any way been weakened.

The Rule is discharged.

E H M

Bail refused

1914
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EMPEROR

APPELLATE CIVIL.

Before Holmwood and Clapman JJ

JOGENDRA NATH GOSWAMI

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CHANDRA KUMAR MOZUMDAR *

1914

April 20

Chikani Right—Contract of sale of a chikani tenure—Misrepresentation by non disclosure of facts—Suit for rescission by purchaser—Transfer of Property Act (II of 1932) s. 55—Duty of seller

A *chikani* tenure in the District of Rungpur is not a temporary tenure under the Transfer of Property Act terminable at six months notice but a perpetual right which may develop into occupancy right.

When the vendor is informed by the purchaser of his object in buying certain property and the lease contains covenants which will defeat that object mere silence will in equity be equivalent to misrepresentation.

Flight's *Dart* followed (1).

SECOND appeal by Jogendra Nath Goswami, the plaintiff.

This appeal arose out of a suit for recovery of the halves of currency notes of the value of Rs. 1,100 given by the plaintiff to the defendant for a plot of land which the plaintiff contracted with the defendant to buy for Rs. 1,100.

Plaintiff informed the defendant that he was buying the land to settle his grand-nephew permanently thereon and enquired if it would answer the purpose. Plaintiff subsequently found that the defendant did not possess a transferable *chikani* right in the land.

* Appeal from Appellate Decree, No. 2827 of 1911, against the decree of Frankishona Bhowa District Judge of Rungpur, dated July 26, 1911, affirming the decree of Ali Ahmed Subordinate Judge of Rungpur, dated Sept. 3, 1911.

Hence the suit for refund of the half notes. The learned Subordinate Judge held that the defendant had a transferable right to the land and he accordingly directed the defendant to execute a *kabala* on receipt of the other halves of the notes. Plaintiff, thereupon, appealed to the District Judge of Rungpur and contended that the defendant had given him to understand that he had a permanent right to the land which he had not, and the plaintiff was therefore entitled to rescind the contract. He also contended that the defendant had no transferable rights.

The learned District Judge held that there was no misrepresentation and dismissed the appeal. Hence the second appeal.

Babu Mahendra Nath Roy (with him *Babu Hira Lal Sanyal*), for the appellant. The suit has been dismissed on one of the issues but the material questions have been overlooked. It has been found that the seller has a transferable interest but has he such interest as he professed to transfer (Transfer of Property Act, s. 55 2). If he had no such interest, plaintiff should succeed.

It is also necessary to determine what was it exactly that the plaintiff understood he was buying and whether the defendant by his conduct, induced him to believe that he held a permanent interest. Defendant knew plaintiff's object in buying the land. His silence amounted to misrepresentation. Darts' Vendors and Purchasers, 7th Ed., 103-04, *Flight v Barton* (1). If the defendant is innocent of wilful misrepresentation, even then if the plaintiff was under a wrong impression and the defendant was aware of it, the contract could not stand.

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Babu Kishori Lal Sircar (with him *Babu Harish Chandra Roy*) for the respondent. Plaintiff knew the nature of my right. He was a sub-tenant on the land for years. He entered into the contract with his eyes open.

Rescission can only be allowed under circumstances specified in S. 50 of the Specific Relief Act.

Even if there was any misrepresentation the contract is not voidable for the plaintiff had the means of discovering the truth with ordinary diligence. S. 19 of the Contract Act (Exception). The plaintiff could have discovered the truth if he was so minded.

Babu Hira Lal Sanyal in reply.

HOLWOOD AND CHAPMAN JJ.—This second appeal arises out of a suit brought by the plaintiff for rescission of a contract and for return of half notes to the value of 1000 rupees. In the alternative if it be found by the Court that the defendant had a transferable *chudam* right in the land in suit and if it be held that the plaintiff is bound according to law to purchase the said land from the defendant then the defendant may be directed to execute a conveyance in respect of the said land containing lawful and proper terms.

The case in the first Court was considered on six issues that were framed and it is a curious circumstance that in both the Courts below this case has been decided exclusively on a consideration of the 6th issue which carefully avoids all the real points which arise in the case. That issue is whether the defendant has got any interest in the property proposed to be sold, and if so whether that interest is transferable. Now without framing that issue at all it is obvious both upon the pleadings and upon the facts that the defendant has got an interest in the property and that that interest is transferable. But the question which

issues in this case is whether he had represented that interest to be other than it really was and whether he thereby had deceived the plaintiff into buying what he had no intention of buying.

The simple questions which the Subordinate Judge says are immaterial raised in the 2nd 3rd 4th and 5th issues really entitle the plaintiff to have this question of misrepresentation discussed because if he was deceived he is entitled to receive back the other halves of the currency notes and the defendant is not entitled to receive the remainder of the consideration and the plaintiff could not be barred by estoppel from rescinding the contract if the contract was based on misrepresentation.

The question whether the plaintiff was deceived is one which largely rests upon the question of the *chukani* right. This the Subordinate Judge in the first Court has clearly decided erroneously. He says *chukani* right is not equivalent to occupancy right nor to *mokanari istem* as it always denotes a temporary right. But we have been asked to hold he was right on the authority of certain passages in Dr W W Hunter's Gazette for the district of Rungpur. Unfortunately these passages are self contradictory and carry with them their own refutation. Dr Hunter says *chukanidars* are under tenants who hold their lands from cultivators of a higher class and can be ejected at the will of the superior tenant. He gives no authority for the statement. In another passage he speaks of *chukanidars* as *mokanidars*. We prefer to follow a far higher authority Dr Field who went into the matter extremely carefully collected a most valuable table of all the various tenures in Bengal and specially dealt with the rights of *jotedars* and *chukanidars* under them in the district of Rungpur from which this case comes. Citing the

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report of the Rent Commission in 1876 it is said that a large majority of jotedars have small holdings and are tenants proper. But a large number of jotedars have tenants under them who are called either *chul* andars or *lorfa proyas*. The *chul* andars too have often tenants under them and in some cases especially in the larger jotes there are four or more degrees before you get to the actual cultivators. Jotes are saleable quite irrespective of the term during which they have been held whether jotes held direct from the zamindar or *chul* and jotes which are held from a jotedar. There is therefore a permanent element in these *chul* and rights which may develop into an occupancy right and they are freely saleable even before they develop into occupancy rights. In this case if the defendant had such a right it must have already matured into an occupancy right inasmuch as he had held this *chul* and or so called *chul* and for more than 12 years.

The learned Judge in appeal says nothing about *chul* and rights but he finds as a fact that the defendant never had anything but a yearly tenancy created for one year for the purpose of building temporary dwelling houses and carrying on jute business and that he stood in the name of the defendant's brother who is dead and the defendant is his heir. The defendant continued to hold it after the expiration of the lease and no new lease was ever granted. The plaintiff appears to have held this land or a portion of it on a sublease for 9 years. But on this finding it is clear that the tenancy is a precarious one and that under the Transfer of Property Act the defendant and his vendee would be liable to be ejected on six months' notice at the end of any year of tenancy. This certainly is not a *chul* and right. It is urged that the defendant's own possessor describes it as *chul* and right and that the plaintiff cannot have been deceived and

with due diligence he could have discovered what the real right was.

The question which really arises in this case is, did the defendant deceive the plaintiff by holding out to him according to the words of his own written statement that he had a *chukni* right for sale, which he was willing to let the plaintiff purchase for the purpose of permanently settling his nephew on the land, when he had in reality nothing but a leasehold from year to year transferable only under the Transfer of Property Act. It is clear from the written statement that the defendant knew that the plaintiffs' intention was to permanently settle his nephew upon this land after the purchase, and it has always been held as laid down in the case of *Flight v Barton* (1), that if the vendor be informed by the purchaser of his object in buying and the lease contains covenants which will defeat that object, mere silence will in equity be equivalent to misrepresentation, in other words the defendant was bound to disclose to the plaintiff that the word *chukani* in his lease had no meaning or at any rate not the meaning which persons residing in the Rungpur district are entitled to attach to it. But this question can only be decided by a consideration of the various documents in the case which we are surprised to see the lower Courts do not appear to have taken any notice of with the exception of the defendant's pottah. These documents are the title-deeds of the Shaks, the defendant's title-deeds the *kabula* itself and the correspondence between the parties. These documents have not been printed in the paper-book probably because the lower Courts did not refer to them. But it is obvious that the question whether the defendant deceived the plaintiff cannot

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be decided without further reference to all these matters

The case therefore must go back for consideration of this point. If it be found that the defendant had nothing but a leasehold right from year to year under the Transfer of Property Act, and if the kabala and the correspondence show that he purported to sell the *chukani* right and not merely the right he acquired from the Shabs whatever that right might be, then the defendant must be held to be guilty of fraudulent concealment and the plaintiff is entitled to have his half-notes back and cancel the contract. If on the other hand it be held that the defendant has *chukani* right as defined by Dr Field and as generally recognised in the Rungpur district, or that the plaintiff had full knowledge that what is described as *chukani* right in the pottah of the defendant was nothing more than a transferable yearly tenancy for non-agricultural purposes, then the plaintiff cannot succeed. As regards the contention that the plaintiff had the means to discover the truth with ordinary diligence we may again point out that if the use of the word *chukani* in the defendant's title-deeds misled the plaintiff or if as the plaintiff says, the defendant refused to show him his title-deeds, then the exception to section 19 of the Contract Act does not apply.

The case will go back to the lower Court to be decided with reference to the directions we have given in this judgment. The lower Court will not take any further evidence but will consider the evidence and the documents that are already on the record. The costs will abide the result.

APPELLATE CIVIL.

Before Jenkins C. and Woodroffe J

ABDULLAH HOSSEIN CHOWDHURY

1914

May 6

v

ADMINISTRATOR-GENERAL OF BENGAL *

Leave to appeal to Privy Council—Application—Civil Procedure Code (Act I of 1908) s 110—Computation of time—Limitation Act (IX of 1908) s 12 whether ultra vires—Legislative powers of the Governor General in Council—Order in Council 1858—Government of India Act 1858 (21 & 22 Vict c 106) s 64—Indian Councils Act 1861 (24 & 25 Vict c 67)—Letters Patent 1865 ss 39 44

Section 12 of the Limitation Act of 1908 applies to applications for leave to appeal to His Majesty in Council

Section 12 sub cl (2) which enacts that in computing the period of limitation prescribed for an application for leave to appeal the time requisite for obtaining a copy of the decree appealed from shall be excluded was within the legislative powers of the Governor General in Council not being in contravention of section 64 of the Government of India Act 1858 and is not ultra vires

Easter Mortgage and Agency Company Limited v Purna Chandra Sarbajna (1) Lakshmanan v Peryassami (2) Anteson v Periasami (3) In re Sita Ram Kesho (4) Thurai Rajah v Jaimilabdeen Roithan (5) Moroba Ramchandra v Ghanasham Vilkant Nadkarni (6) Motichand v Ganga Parshad Singh (7) referred to

APPLICATION by the plaintiff, Abdullah Hossein Chowdhury, for leave to appeal to His Majesty in Council from the judgment of Cox and Ray JJ (v)

* Application for leave to appeal to His Majesty in Council No 85 of 1913

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| (1) (1912) I L R 39 Calc 510 | (5) (1895) I L R 18 Mad 494 |
| (2) (1887) I L R 10 Mad 373 | (6) (1894) I L R 19 Bom 301 |
| (3) (1891) I L R 15 Mad 169 | (7) (1901) I L R 24 All 174 |
| (4) (1892) I L R 15 All 14 | L R 29 I A 40 42 |
| (8) (1913) I L R 41 Calc 148 | |

1914

ABDULAH
HOSEIN
CHAWHUKA

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It was conceded that if the application was within time a certificate should issue. The only question was whether the application was within time. By an order in Council, dated the 10th April 1838, it was declared "that from and after the 31st day of December next, no appeal to Her Majesty, her heirs and successors in Council shall be allowed by any of Her Majesty's Supreme Courts of Judicature at Fort William in Bengal . . . unless the petition for that purpose be presented within six calendar months from the day of the date of the judgment, decree or decretal order complained of and unless the value of the matter in dispute shall amount to the sum of ten thousand Company's rupees at least

" See Sifford and Wheeler's Privy Council Practice, p 191

By section 12, sub cl (2) of the Limitation Act of 1908 it was provided that " in computing the period of limitation prescribed for . . . an application for leave to appeal . . . the time requisite for obtaining a copy of the decree . . . appealed from . . . shall be excluded "

The petition for leave was presented more than six calendar months from the date of the decree, but if in computing the period of limitation, the time requisite for obtaining a copy of the decree was excluded, the application was within time. The question was, should such time be excluded in computing the period of limitation and resolved itself into the consideration of whether section 12, sub cl (2) of the Limitation Act of 1908 as set out above was *ultra vires* having regard to the declaration contained in the Order in Council of 1838.

Babu Gunada Charan Sen, for the petitioner, applied for leave to appeal to His Majesty in Council.

Mr. B. Chakravarti (with him *Babu Upendra Lal Roy* and *Babu Bhupendra Chandra Guha*) for the opposite party. The application for leave is out of time and ought to be refused. Sections 5 and 12 of the Limitation Act 1908 which purport to extend the time during which such an application must be made are to that extent *ultra vires*. See Safford and Wheeler's Privy Council Practice pp 465 466 p 476 note (s). The order in Council of the 10th April 1838 is definite in its prohibition. The provisions of the Order in Council of 1838 were revived and confirmed by section 64 of the Government of India Act, 1858 (21 and 22 Vict. c. 106) and by section 22 of the Indian Councils Act 1861 (24 & 25 Vict. c. 67), it was provided that the Governor General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of 21 & 22 Vict.

■ 106 entitled An Act for the Better Government of India.

Cf. Ilbert's Government of India 2nd edition p 199. It follows that sections 5 and 12 of the Limitation Act (which was passed by the Governor General in Council) are *ultra vires* so far as they are in conflict with the order in Council of 1838. It cannot be said that the prohibition is an interference with the prerogative of the Crown to receive any petition. The order prohibits the presentation of an application to the High Court for leave to appeal to His Majesty in Council—it leaves His Majesty in Council unfettered. This distinction is recognised in section 112 of the Code of Civil Procedure.

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it and it can of course do nothing beyond the limits which circumscribe these powers. *The Queen*

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v *Burah* (1) The very point involved in this matter was raised in *Gajadhar Pershad v The Widows of Imam Ali Beg* (2) Under the Limitation Act of 1877, the time within which the application for leave to appeal to the Privy Council, had to be made was six months from the decree *Moroba Ramchandra v. Ghanasham Nilkant Nadkarni* (3), *In the matter of petition of Sita Ram Kesho* (4) *Jawahir Lal v Naram Das* (5) The following authorities were also referred to *Kirkland v Modes Pestonjee Khoorsedjee* (6), *The East India Company v Syed Ally* (7), *In the matter of the petition of Feda Hossein* (8), *Alter Kaufman v Government of Bombay* (9) It is clear from the authorities that section 5 of the Limitation Act of 1877 does not apply to applications for leave to appeal to the Privy Council The decision in *Eastern Mortgage Agency Co Ltd v Purna Chandra Sarbagna* (10) which was under section 12 of the Limitation Act of 1908, cannot be taken as binding, as the present argument was not advanced or considered in that case There is no reason why the time requisite for obtaining a copy of the decree should be excluded as it is not necessary to file a copy of the judgment of the High Court at the time of presenting the petition It is true it has been the practice to exclude such time, in computing the period of limitation but the present objection has never before been urged and the matter is one of first impression The amendments introduced in sections 5 and 12 by the Limitation Act of 1908 have given rise to the present question Field's Regulations of the Bengal Code p 139 and Moiley's Digest Vol I p CXXXV, were also referred to

(1) (1878) L R 5 I A 178 193

(2) (1875) 15 B L R 221

(3) (1894) I I R 19 B m 311

(4) (1897) I I R 15 W 14

(5) (1878) I I R 1 A 144

(6) (1843) 3 Moo I A 220

(7) (1827) 7 Moo III A 555

(8) (1870) I L I I Calc 431

(9) (1894) I L R 18 Bo 630

(10) (1912) I I R 39 Calc 510

Babu Gunada Charan Sen, for the petitioner. The Indian Legislature was entirely competent to pass section 12, sub-section (2) of the Limitation Act of 1908. The legislative powers of the Indian Legislature are defined by section 22 of the Indian Councils Act, 1861 (24 & 25 Vict, c. 67). It is true that one of the exceptions provided by that section is the Government of India Act 1858 (21 & 22 Vict, c. 106). But that exception does not operate to affect the matter in issue in the present application. The object of the Government of India Act 1858, as appears from the title, the preamble and the various provisions of the Act, was to regulate the administrative government of India and not to regulate the procedure of the Courts. The object was in particular to provide for the transfer of the government of this country from the East India Company to the Crown and to make the necessary administrative changes for that purpose. Section 64 refers to the Charter granted to the East India Company and the executive and administrative government of India and does not purport to fetter the absolute right of the Indian Legislature to pass any Act relating to the administration of justice, or the procedure of the Courts. The matter is placed beyond doubt by section 11 of the Charter Act of 1861 (24 & 25 Vict, c. 104) which was passed in the same year as the Indian Councils Act which authorised the establishment of the High Courts in India and defined their jurisdiction. By section 11 "all provisions then in force in India of Acts of Parliament, or of any orders of Her Majesty in Council or shall be taken to be applicable to the said High Courts so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to

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the matters aforesaid of the Governor-General of India in Council' See also section 9 The Letters Patent of the Calcutta High Court issued in 1865 in pursuance of the Charter Act, by section 39 provides for appeals to the Privy Council and by section 14 provides that "all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council" Notwithstanding the Order in Council of 1838 variations have been introduced in respect of cases falling within the second clause of section 110 of the Code of Civil Procedure This has presumably been done by virtue of the authority of the Charter Act 1861

[JENKINS CJ What is the history of Art 179 of the Limitation Act of 1908?]

The provision originally appeared in the Privy Council Appeals Act (VI of 1874) section 8 was as follows 'Such application must ordinarily be made within six months from the date of such decree But if that period expires when the Court is closed, the application may be made on the day that the Court re-opens' This Act was repealed by the Code (Act X of 1877) but section 599 of the Code of 1877 reproduced that provision *verbatim* Section 599 was repealed by the Limitation Act (XV of 1877), but the same period of limitation namely, six months from the date of the decree appealed against is prescribed by Art 177 of the Limitation Act of 1877—and the same period is prescribed by Art 179 of the Limitation Act of 1908 It is to be observed if section 12 of the Limitation Act of 1908 be *ultra vires*, so must section 8 of the Privy Councils Act of 1874 have been *ultra vires* Indeed on *Eastern Mortgage & Agency Co., Ltd v Purni Chandra Sarbagna* (1) which was a decision under section 12 of the Limitation

Act of 1908. Although the point involved in the present application was raised in argument in *Gajadhar Pershad v. The Widows of Enam Ali Beg* (1), no decision was come to. The case turned on a question of irregularity. The other authorities cited by the opposite party were decisions under the Limitation Act of 1877 and hence inapplicable.

Mr. Chakravarti, in reply.

Cur. adv. vult.

JENKINS C. J. This is an application by one who desires to appeal to His Majesty in Council for a certificate that as regards amount or value and nature the case fulfils the requirements of section 110 of the Civil Procedure Code.

It is conceded that if the application is within time a certificate ought to issue: it is however contended that the appeal is not within the period of six calendar months prescribed by the Order in Council of 1888. To this it is answered that the application is within six months from the date of the decree appealed from, if, in computing the period of limitation the time requisite for obtaining a copy of the decree is excluded.

The Order in Council does not expressly allow this exclusion, but the Limitation Act of 1908, section 12, purports to direct it. The question for our decision is whether it was within the competence of the Indian Legislature to enact this provision. The Governor-General in Council has power at legislative meetings to make laws for all Courts within British India subject to certain exceptions, and among them is this that he cannot make any law repealing or affecting any provision of the Government of India Act 1858. (*See the Indian Councils Act 24 & 25 Vict., c. 67, s. 22.*)

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Section 61 of the Government of India Act, 1858, provides that all Acts and provisions now in force under Charter or otherwise concerning India shall subject to the provisions of this Act continue in force and be construed as referring to the Secretary of State in Council in the place of the said Company and the Court of Directors and Court of Proprietors thereof.

Therefore, it is contended, section 12 of the Limitation Act so far as it relates to an application for leave to appeal to His Majesty in Council was beyond the powers of the Indian Legislature

This section is not the first instance in which the Indian Legislature has made provisions which purport to modify the absolute terms of the order of 1838. Thus by the Privy Council Appeals Act, 1874, it was provided that applications by any one desiring to appeal to Her Majesty in Council must *ordinarily* be made within six months from the date of the decree, but if that period expired when the Court was closed the application might be made on the day the Court re-opened (*see* section 8) The Bill which afterwards became this Act is said to have been submitted to and approved by the Judicial Committee (*see* note in Whitley Stoke's Anglo-Indian Codes, Vol. II, page 135)

I have looked further into this, and found a statement by Mr Arthur Hobhouse, as he then was, which fully bears out this note Addressing the Governor-General's Council he said, "the Bill was now put into a shape which was acceptable to the Judicial Committee of the Privy Council The Secretary of State had been in correspondence with the Judicial Committee at our desire and they had approved of the Bill as it stood"

This provision was repeated in the Codes of 1877 and 1882 (*see* section 599), and though the section?

the Code of 1882 was repealed in 1888 that was not, as I understand, by reason of any doubt as to the competence of the Indian Legislature.

By the Limitation Act of 1877 it was provided that an application for the admission of an appeal to Her Majesty in Council should be presented within six months from the date of the decree appealed against (Article 177).

Though an opinion was once expressed that this provision was repealed by the Code of 1882, *Fazul-un-nissa v. Mulo* (1) no doubt seems ever to have been entertained as to the power of the Indian Legislature to deal with this subject: *Lakshmanan v. Peryasami* (2), *Anderson v. Periasami* (3). *In re Sita Ram Kesho* (4), *Thurai Rajah v. Jainilabdeen Rowthan* (5), *Moroba Ramchandra v. Ghanasham Nilkant Nadkarni* (6). Prior to 1874 the more general view in this Court seems to have been that when the time for appealing expired in vacation the petition could not be presented on the day the Court re-opened [*Tamvaco v. Skinner* (7)]. But I find that it has now become the established practice to receive an application made on the day the Court re-opens though beyond the prescribed six months, and this has been in reliance on section 8 of the Privy Council Appeals Act 1874 and of the provisions that have taken its place in the Code and the Limitation Acts.

It is true that neither the 2nd clause of section 5 nor the 2nd para. of section 12 of the Limitation Act of 1877 has been applied to an application for leave to appeal to His Majesty in Council, but that is because an application for that purpose did not come

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(1) (1834) I. L. R. 6 All. 250.

(4) (1892) I. L. R. 15 All. 14

(2) (1837) I. L. R. 10 Mad. 373.

(5) (1895) I. L. R. 18 Mad. 484

(3) (1891) I. L. R. 15 Mad. 169.

(6) (1894) I. L. R. 19 Bom. 361.

(7) (1867) I. B. L. II (O. C.) 39.

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within the terms of either section The Limitation Act of 1908 has been extended to such an application. I do not rely on the decision in *Eastern Mortgage and Agency Co Ltd v Purna Chandra Sarbagna* (1), as showing that this extension was valid as the objection to the powers of the Indian Legislature was not advanced in that case This is the first occasion on which the point has been taken But if section 8 of the Privy Council Act of 1874 was within the competence of the Indian Legislature, I think section 12 of the Limitation Act of 1908 must equally have been within its powers And I have shown that there is strong reason for thinking that section 8 was valid legislation

The Courts power to deal with applications for leave to appeal rests primarily on clause 39 of the Letters Patent, which ordains that any person may appeal to the Privy Council in the cases there mentioned 'Subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing rules and orders are hereby varied and subject also to such further rules and orders as We may with the advice of Our Privy Council hereafter make in that behalf'

Clause 44 of the Letters Patent is in these terms — "And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations, and may be in all respects amended and altered thereby"

Apart from section 64 of the Government of India Act 1858 there would seem to be no bar to the

legislation under consideration Even if it be that legislation regarding the admission of appeals affects the prerogative of the Crown [see *Moti Chand v Gan-ga Parshad Singh* (1)], still it would not be deemed invalid by reason of that only though subject to the power of disallowance by the Crown Nor do I think the enactment of section 12 of the Limitation Act, 1908, so far as it relates to applications for leave to appeal to His Majesty in Council, is forbidden by section 64 of the Government of India Act, 1858 The whole section must be read and it must be borne in mind that it is a part of an Act dealing with the transfer to the Crown of the Government of India

The conclusion then to which I come is that section 12 of the Limitation Act of 1908 was within the legislative powers of the Government of India, and that the present application is within time A certificate, must, therefore, issue that as regards amount or value and nature the case fulfils the requirements of section 110 of the Code

The respondent must bear the costs of this application

WOODROFFE J. *Agile*

J C

Certificate granted

(1) (1901) I L R 24 AH 174 L R 29 I A 40 42

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[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

*Easement—Light and Air—Ancient light, infringement of—Nuisance—
Measure of right—Requirement of light for the ordinary purposes of
inhabitation or business of the tenement according to the ordinary
notions of mankind—Concurrent findings of fact—Grounds of appeal
relating not to fact, but to pure question of law*

In this case which was an appeal in an action for damages for the infringement of the appellants alleged rights of light and air, the Judicial Committee held that though there were concurrent findings of fact in the Courts below yet the grounds of appeal did not relate to those findings but to the question whether the Courts below had taken the proper view of the legal rights of the appellants, and whether, accordingly, the test which they had applied on the question of the infringement of the appellants rights was the correct one. That was a pure question of law which admittedly turned upon the interpretation to be given to the decision of the House of Lords in *Colls v. The Home and Colonial Stores* (1), when considered in connection with the late decision of the House of Lords in *Jolly v. Kne* (2).

Held, further, that in *Colls' Case* (1) the legal test in such an action was formulated by Lord Davey as being that "the owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitation or business of the tenement according to the ordinary notions of mankind."

The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance. And the House of Lords in that case adopted that formulation of the law.

* Present LORD DUNEDIN LORD MOUTATON, SIR JOHN EDGE, AND MR. ANNEER ALI

In the judgment of the House of the Lords in *Jolly v Aine* (1) there was an authoritative exposition of the decision in *Colls' Case* (2) and it was established that the law as stated by Lord Davey is the law as laid down by that decision, and that it accurately formulated the law on the subject. In the High Court, in the present case the Court of first instance adopted Lord Davey's opinion, and applied it consistently to the findings of fact to which he came, and the Appellate Court had substantially taken the same test. Their Lordships, therefore, affirmed the judgments of the Courts below, and dismissed the appeal.

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APPEAL 17 of 1913 from a judgment and decree (1st August 1911) of the High Court at Calcutta in its Appellate Civil Jurisdiction, which affirmed a judgment and decree (29th March 1911) of Stephen J a Judge of the same Court in its ordinary original jurisdiction.

The plaintiffs were appellants to His Majesty in Council.

The main question for determination in this appeal was to the whether the appellants were entitled to relief by injunction or damages for an alleged interference with their rights to access of light and air to their house and premises 7, Esplanade East, in Calcutta.

The facts are fully stated, and the judgments of the Courts are set out in the report of the hearing of the case on appeal to the High Court (SIR LAWRENCE JENKINS C J and WOODROFFE J) which will be found in I L R 39 Calc 59.

On this appeal,

De Gruyther K C and *A M Dunne*, for the respondents, took a preliminary objection to the hearing of the appeal on the ground that the Appellate Court had affirmed the decision of the first Court, and there were concurrent findings of fact by both Courts that no actionable nuisance had been proved, and that no damage had been sustained by the appellants by

(1) [1907] A C 1

(2) [1904] A C 179

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reason of the depreciation in value of their house and premises, and there was no substantial question of law, it was submitted, therefore, that no appeal lay. Reference was made to the Civil Procedure Code (Act V of 1908) section 110, *Sajjad Husain v Wazir Ali Khan* (1), and *Karuppanan Seivai v Srinivasan Chetti* (2). Reference was made on the merits of the case to *Colls v Home and Colonial Stores* (3), *Higgins v Betts* (4) and *Jolly v Kine* (5), it being contended that the principles of law applicable to the present case which were laid down in those cases had been rightly applied by the High Court and that the appellants had failed to establish any ground for the relief sought by them.

Uppohm K C Hudson K C and W E Vernon for the appellants contended that the evidence in the case clearly proved that the respondents' new building caused a nuisance or illegal obstruction to the appellants' ancient windows, that by reason of the erection of the building the appellants' premises had been, to a substantial degree, rendered less fit for the purpose of business or occupation, that such erection had sensibly interfered, according to the ordinary notions of mankind, with the comfort and convenience of the appellants' building as a residence, and its usefulness as a place of business, and that the question whether sufficient light was left for the purposes of a dwelling house and place of business was not the test to be applied in order to ascertain whether the respondents' buildings constituted an actionable nuisance, but the test was whether there had been a diminution of light caused sufficient to amount to a nuisance. The

(1) (1912) I L R 34 All 455

L R 39 I A 157

(2) (1901) I L R 25 Mad 215

L R 29 I A 38

(3) [1904] A C 179

(4) [1905] 2 Ch 210

(5) [1907] A C 1

arguments were based on *Colls v Home and Colonial Stores* (1) and *Kine v Jolly* (2) and, on appeal, *Jolly v. Kine* (3), and it was contended that as to what was the proper test the Judges in those cases had differed in opinion, and that the decision on the question in the former case had not been altogether supported by the Court of Appeal or in the latter case on appeal. The proper test had not been applied to the present case by the High Court, which had therefore not taken a proper view of the appellants' rights. *Griffiths v Richard Clay and Sons, Limited* (4) was also referred to. The appellants, it was submitted, had a cause of action against the respondents and were entitled to damages for the injury caused to their rights.

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The respondents were not further heard

The judgment of their Lordships was delivered by

LORD MOULTON The action in which the present appeal is brought is an action in which the appellants sued the respondents for infringement of certain rights of light possessed by them in connection with premises known as 7 Esplanade East Calcutta, of which they owned the freehold. The respondents had erected a building known as 8 Esplanade East, Calcutta, lying to the east of the appellants' premises and so situated that the western walls of the respondents' buildings were parallel to and at a distance of 17 feet from the eastern wall of the appellants' building. The ground on which the respondents' building was erected had for more than 20 years previously been occupied by much lower buildings, and it is conceded that the appellants had acquired rights of light thereby for the windows on the east side of their

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(1) [1904] A.C. 179

(3) [1907] A.C. 1

(2) [1905] 1 Ch. 480, 481, 493

(4) [1912] 2 Ch. 291, 298

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premises The new buildings of the respondents greatly exceed in height the former buildings upon the site and decreased the amount of light coming to the eastern windows of the appellants, and it is in respect of this interference with the access of light to their windows that the appellants brought the action.

The action came on for trial with witnesses before the Hon Mr Justice Stephen sitting as a Judge of the High Court of Judicature at Fort William in Bengal, in its ordinary civil jurisdiction, and on the 29th day of March 1911 he gave judgment dismissing the action. An appeal was brought from that judgment to the High Court of Judicature at Fort William in Bengal in its appellate jurisdiction, and on the 1st day of August 1911 judgment was delivered by that Court dismissing the appeal. It is from this judgment that the present appeal is brought.

Both in the Court of first instance and in the Court of Appeal the facts of the case are dealt with in detail, and clear findings are given on all relevant points of fact. Their Lordships can find no material difference between the views taken by the two Courts on these points of fact though the expressions used may not be in all cases identical. Their Lordships therefore would feel justified in holding, if it were necessary, that this is a case of concurrent findings of fact. But in truth the grounds of appeal do not relate to these findings of fact, but to the question whether the Courts below have taken the proper view of the legal rights of the appellants and whether accordingly, the test which they applied as to whether those rights had been infringed was the correct one. This is a pure question of law, and it was admitted by counsel for the appellants that it practically turns upon the interpretation to be given to the well-known decision of the House of Lords in the case of *Colls v*

The Home and Colonial Stores (1), when considered in connection with the later decision of the House of Lords in *Jolly v Kine* (2).

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Their Lordships do not consider that it is either necessary or profitable to go into the history of the divergent views in respect of the nature and extent of rights of light acquired by prescription that prevailed in the Courts prior to the decision in *Colls's Case* (1). It suffices to say that one stream of authorities gave countenance to the view that by the enjoyment of light for a period of 20 years, there could be acquired an indefeasible right to the enjoyment of a like amount of light in the future. The conflicting stream of authorities countenanced the view that nothing constituted an infringement of rights of light which did not amount to an actionable nuisance, so that the amplitude of previous enjoyment was no measure of the rights acquired thereby. This conflict of views was fully recognised by the noble Lords who took part in the decision of *Colls's Case* (1), and there can be no doubt that it was their intention to decide between them and to lay down the law in such a manner as to prevent uncertainty in the future.

Mr Justice Stephen takes as expressing the law laid down by this decision the following quotation from the opinion of Lord Davey in that case —

"The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitation or business of the tenement according to the ordinary notions of mankind."

The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance?

And the Court of Appeal although they do not so directly base their judgment on the above passage in Lord Davey's opinion, appear to their Lordships to

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have substantially taken the same test. But in their Lordships' opinion it is not necessary to examine minutely the verbal differences between the expressions used in the Court of Appeal and by the Judge of first instance. They accept in full the findings on fact of the Judge of first instance, and they are of opinion that he has consistently applied to them the legal test above formulated. The only question therefore is whether it accurately formulates the law on the subject.

It is evident on reading the opinion of Lord Davey that he intended the passage to be a precise formulation of the rights of a dominant tenement in respect of ancient lights, and his opinion was formally accepted by Lord Robertson who also took part in the decision. The opinion of the Lord Chancellor in that case is equally clear on the essential points that the easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription and that there is no infringement unless that which is done amounts to a nuisance. It has been suggested that a different view is to be found in the opinions of Lord Macnaghten and Lord Lindley, but although there are passages in these opinions which might if they stood alone indicate that those noble Lords considered that to some extent the amount of light enjoyed in the past might influence the rights acquired for the future, there is no reason to think there was any intention on the part of those noble Lords to differ from the conclusions of their colleagues. It must be taken therefore that the House of Lords adopted the formulation of the law given by Lord Davey as above mentioned.

But if any doubt remained on the point it is in their Lordships' opinion set at rest by a consideration of the subsequent decision of the House of Lords in

the case of *Jolly v. Kine* (1). In that case Mr. Justice Kekewich had found as a fact that the obstruction amounted to a nuisance, but in the course of his judgment said that the room affected was 'still a well-lighted room.' He gave judgment for the plaintiff. On appeal to the Court of Appeal there was a division of opinion among the judges. Romer, L.J., held that under the decision in *Colls's Case* (2) the finding that it was still a well-lighted room was fatal to the plaintiffs' claim. Vaughan Williams and Cozens Hardy, L.J.J., held to the contrary. On appeal to the House of Lords then Lordships were equally divided and accordingly the appeal was dismissed. But this division of opinion was not due to any doubt as to the law to be applied. The Lord Chancellor gives his opinion on the law as laid down in *Colls's Case* (2) in the following words —

'The right of the owner or occupier of a dominant tenement to light is based upon the principle stated by Lord Hardwicke in 1752 in *Fish moigere's Company v. East India Company* (3) that he is not to be molested by what would be equivalent to a nuisance. He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitation or business according to the ordinary notions of mankind having regard to the locality and surroundings. That is the basis on which the decision of this House proceeded.

Lord James of Hereford concurred in the judgment delivered by the Lord Chancellor.

These were the judgments of the two noble Lords who were in favour of dismissing the appeal. On the other hand, Lord Robertson was of opinion that the appeal should be allowed and in his opinion says —

'I adhere as I did in *Colls's Case* (2) to the definition given by Lord Davey in entire accordance with the judgments of the other noble and learned Lords. According to that definition the quantity of light to which

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(1) [1907] A.C. 1

(2) [1904] A.C. 179

(3) (1752) 1 Dick. 163

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right is acquired in 20 years is 'what is required for the ordinary purposes of inhabitation or business of the tenement according to the ordinary notions of mankind

Lord Atkinson, who was the other member of the Court, was also in favour of allowing the appeal, and referring to the decision in *Colls's Case* (1) he says —

' It would appear to me that that case established the principle that there must be an invasion of the legal right of the owner of the dominant tenement sufficient to amount to a nuisance in order to give him a right of action and that as long as he receives through the windows of his dwelling house, or in the case of a particular room in his dwelling house through the windows of that room an amount of light which, to use the words of James L.J., in *Hell v. Pearson* (2) is 'sufficient according to the ordinary notions of mankind for the comfortable use and enjoyment' of his dwelling house or of the room in it as the case may be no nuisance has as regards him been created, and no legal wrong has been inflicted upon him

And although he does not expressly repeat the well-known passage from Lord Davey's opinion in *Colls's Case* (1) he shows by the language which he uses that he thoroughly agrees with it, and says that to him it appears to be of general application

In the judgment of the House of Lords in *Jolly v. Kine* (3) there is therefore an authoritative exposition of the decision in *Colls's Case* (1), and it is established that the law as formulated by Lord Davey is the law laid down by that decision. It is somewhat remarkable therefore that counsel for the appellants should have sought to treat the decision in *Jolly v. Kine* (3) as throwing some doubt upon the interpretation of the decision in *Colls's Case* (1), operating, if such an expression could be used, to weaken it in the direction of directing that regard should be had to the extent of previous enjoyment of light. The only explanation of such a view is that the appeal was in the end dismissed, inasmuch as the House was equally divided. But this

(1) [1904] A C 179

(2) (1871) L R 6 Ch. App. 809

(3) [1907] A C 1

was in no way due to any difference of opinion as to the law, but to the fact that the Lord Chancellor felt himself entitled to disregard the finding that the room was "still a well-lighted room" in the sense which those words would naturally convey and to hold them as meaning that it would have been considered to be well-lighted according to the standard of a crowded city." His Lordship was led to this conclusion by passages in the evidence and the context of Mr. Justice Kekewich's judgment. It was on this ground alone that he was in favour of dismissing the appeal, and therefore the actual result in that case has no bearing on its effect as an authoritative explanation of the law laid down in *Colls's Case* (1).

Then Lordships are therefore of opinion that the learned Judge at the trial took the proper test as to whether or not there had been an infringement of the rights of the appellants and that he applied it correctly to the facts of the case. They are therefore of opinion that his judgment was right and that the Court of Appeal was right in affirming it and they will humbly advise His Majesty that the present appeal should be dismissed with costs.

Appeal dismissed

Solicitors for the appellants: *Westbury, Preston & Stauridi*

Solicitors for the respondents, the Members of Mackintosh Burn & Co: *Watkins & Hunter*

(1) [1904] A.C. 171

J. V. W.

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v

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PC^s
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[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Vendor and Purchaser—Conveyance by executor as beneficial owner—Construction of deed of sale—Inconsistency between recitals and operative part of deed—Omission to state expressly that he was conveying the property sold in his capacity of executor

Held (reversing the appellate decision of the High Court, and restoring that of the first Court) that on the construction of a deed of sale and on the evidence in and under the circumstances of the case the title vested in an executor passed to the appellants under the deed by which he together with other vendors purported to convey all his estate right title claim, and demand whate'er in the property sold although he did not expressly state therein that he was conveying the property in his capacity as executor. The plain legal interpretation of the deed should not be allowed to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution. The deed stated plainly that whatever right or title the vendors possessed was to go to support the conveyance and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in a natural sense.

APPEAL No 99 of 1912 from a judgment and decree (25th January 1910) of the High Court at Calcutta in the appellate jurisdiction, reversed a judgment and decree (15th February 1909) of the same Court in the exercise of its ordinary original civil jurisdiction.

The defendants were the appellants to His Majesty in Council.

The main question for determination in the present appeal was whether the title vested in an executor

passed to the appellants under a conveyance executed by him, by which he conveyed "all his estate, right, title, claim and demand whatsoever," without expressly stating therein that he was conveying the property in his capacity as executor

The facts are fully stated in the report of the case on appeal before the High Court (SIR LAWRENCE JENKINS C J. and WOODROFFE J.) which will be found in I L R 37 Calc 362

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On this appeal,

Sir R Finlay K C and *B Dubé*, for the appellants, contended that there was in the will no restriction on the alienation of the property. The permission of the High Court was not necessary, the executor was mistaken in applying for it. *see* section 90 of the Probate and Administration Act (V of 1881). The fact that one of the vendors was an executor made no difference to the transaction, his failure to describe himself as executor did not affect the sale. The case of *Preonath Karai v Surja Coomar Goswami* (1) was referred to. In the construction of the deed of sale there was no ambiguity in the disposing part of the deed as to what the vendors were selling, it was "all the estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon" the property. That included, it was submitted, the right in the property of Hemendranath as executor of the will of Premchand Bysack. The property claimed was alleged to be *stridhan* property which the respondent inherited from her mother Katyani Das. *see* Mayne's Hindu Law, 7th Edn page 900, paragraph 632, but she had failed to prove that her mother's title to the legacy in the will had been completed before her

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death by the assent of the executor to the legacy The respondent was not equitably entitled to the relief claimed by her In any case she was not entitled to recover her share of the house in dispute without paying her portion of the mortgage debt, and of the annuity discharged by the appellants The decision of the Original Court (STEPHEN J) was, it was contended, correct

De Gruyther K C and *A M Dunne*, for the respondent, contended that she had established against the appellants her title to a moiety of the house and premises in dispute, and that the conveyance of 12th December 1900 did not pass or affect her right to the said moiety, The deed did not purport to convey any of the rights Hemendranath Bysack had as executor to the appellants The executorship had in fact come to an end at the date of the deed, and the deed itself stated so The deed of sale was executed 14 years after the death of the testator, and according to the statement in the petition for probate there were no debts payable by the testator On the facts Hemendranath did not retain the property in his hands as executor None of the three vendors who purported to convey the property, had any title in it the conveyance absolutely denies the respondent's title, and could not therefore convey her rights and interests The vendors claimed title through Kityani Das who was a specific legatee and the executor assented to the legacy, and therefore he had no title to this property which he could convey because, on assenting, his title as executor was displaced and came to an end The Probate and Administration Act (V of 1881) section 112 was referred to [LORD MOULTON That is a question of fact, and should have been raised in the Court of first instance] The respondents were minors at the time

Sir R. Finlay K. C., in reply. The point raised at the end of the argument for the respondent was not only not raised previously in the suit, but was absolutely inconsistent with the pleadings, where there was no mention of it, nor was it suggested in the grounds of appeal

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The judgment of their Lordships was delivered by LORD MOULTON. This is an appeal in a suit brought by the respondent against the appellants for a declaration of her title to an equal undivided half part or share in a certain house and premises known as 8, Sobharam Bysack's Street, Calcutta, and for recovery of the premises from the appellants, in whose possession they were at the commencement of the suit, with an inquiry as to *mesne* profits. The facts of the case so far as they are material, are not now in dispute, and are as follows —

The house and premises originally belonged to Prem Chand Bysack who died on the 13th June 1886, leaving a will dated 25th October 1884. By his will the said testator devised and bequeathed the said house and premises to his daughter Katyani Dasee, and her heirs absolutely, subject to two charges of 20 rupees per month, payable to two of his daughters-in-law and then children as and for periods specified in the will. He appointed as executors Shambhoo Nath Bysack (the husband of his daughter Katyani Dasee), and two of her sons, Hemendia Nath Bysack and Ratanlal Bysack. On application for probate of this will, the executors found that a caveat had been entered by some of the relations of the deceased testator, who alleged that the will was a forgery. This led to a suit, where, after a prolonged inquiry, the Court, on the 16th May 1887, pronounced the will

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to be genuine and granted probate of it, and directed that the costs of the executors should be paid out of the testator's estate

It would appear that the executors had no funds in hand out of which they could meet the costs of this litigation, and they therefore mortgaged the property for a sum of Rs 3,950 to Dwarka Nath Dutt, who had been their attorney in the probate suit, in order to secure the payment of his costs, which amounted to Rs 3,400, the balance, Rs 550, being treated as a loan to them. Katyani Dasee was made a party to the mortgage bond apparently to put on record her wish that no portion of the estate should be sold to defray these costs. The term of the mortgage was 10 years.

Shumbhoo Nath Bysack died in 1899, and Ratnmal Bysack died in 1891, leaving his brother Hemendra Nath Bysack sole surviving executor. In 1891 Katyani Dasee also died leaving five sons and two unmarried daughters, of which the respondent was one.

In 1900 the heirs of Dwarka Nath Dutt who had died in the meanwhile, instituted a suit against Hemendra Nath Bysack as sole surviving executor for sale of the property under their mortgage, and at the same time the two annuitants brought suits against him for arrears of their annuities. To meet these demands it was determined to sell the property, and accordingly by a deed, dated the 12th of December 1900, the property was sold to the appellant Bijraj Nopani, one of the appellants, and Dowlatram, since deceased. The other appellants are sued as the executors of his last will and testament, one of them being Bijraj Nopani himself. It is on the interpretation of this deed of conveyance that the question now in issue depends, and in order to make clear the contentions of the two parties it is necessary to explain its

form and to state how the dispute has arisen before discussing the construction of the deed

The deed is made between Hemendra Nath Bysack and his two surviving brothers of the first part, Biroda Sundary Dasee, one of the annuitants of the second part, and Bijraj and Dowlatram of the third part. It recites that the property originally belonged to Piem Chand Bysack, that he devised it to his daughter Katyan Dasee and her heirs absolutely, subject to a charge for annuities of Rs 20 per month, to Biroda Sundary Dasee and Sonamoni Dasee respectively, and that he appointed Shrambhoo Nath Bysack, Hemendra Nath Bysack, and Ratanlal Bysack executors of such will. It then recites the obtaining of probate of the will after suit. It then recites the death of Katyan Dasee on the 8th day of April 1891, leaving five sons and three daughters, and the death of two of the sons unmarried, and also the death of Shrambhoo Nath Bysack on 9th January 1899.

There next comes a recital that Hemendra Nath Bysack on the 4th day of September 1900 obtained an order whereby it was referred to the Registrar of the High Court to enquire whether there was any necessity for the sale of the said house and what provision should be made to secure the payment of the legacies mentioned in the said will out of the rents and profits of the house. It next recites that—

¹ the said Hemendra Nath Bysack the sole surviving executor of the said will has since paid all the debts liabilities and legacies mentioned in the said will

Then follows a recital that Sonamoni Dasee has filed a suit against the said Hemendra Nath Bysack for, amongst other things, a declaration of her rights under the said will, and that the vendors have taken upon themselves the responsibility of entering satisfaction in the said suit, as also of satisfying the claims

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of any of their sisters, and that therefore the petition will not be proceeded with. There next comes a recital that the vendors have agreed with the purchasers that Rs 10,000 shall remain with the purchasers as security for the annuity to Sonumoni Dasee, and that the other annuitant has been paid off by a sum of Rs 705 in full satisfaction of her claim against the property.

Here the recitals terminate and the indenture goes on to witness that the vendors have sold the property to the purchasers for Rs 35,000, of which Rs 10,000 are to be retained by them as security as aforesaid. The vendors grant, sell, and convey the property to the purchasers in ordinary form together with "all the estate right, title, interest, claim, and demand whatsoever of the vendors unto and upon the said messuage, land, hereditaments, and premises and every part thereof, and also all deeds, papers, and writings solely relating to the said premises or any part thereof now in the custody of the vendors or which they can procure without suit."

Then follows a covenant in the following words —

"The vendors do for themselves and himself their and his heirs and representatives do and each of them doth hereby covenant with the purchasers, their heirs representatives and assigns in manner following that is to say that the vendors at the time of sealing and delivery of these presents are lawfully rightfully and absolutely possessed of and in the said messuage, land and hereditaments hereinbefore granted and conveyed as an estate equivalent to fee simple in possession free from encumbrances, and that the vendors now have in themselves full power and absolute right, title and authority by these presents to grant and convey the said messuage, land, hereditaments, and premises unto and to the use and behoof of the purchasers their heirs representatives and assigns from time to time.

Finally, there is a covenant to indemnify the purchasers against any loss at the suit of the annuitant, Sonumoni Dasee, or the three sisters (of whom the respondent is one), which may be incurred by them

by or by reason of the defect, if any, in the title of the vendors to the property

The appellants paid the purchase money and took possession of the property under the conveyance, and remained in possession until the 22nd June 1897 when the respondent brought the present suit, claiming that she was entitled to one-half share in the said house, because as she and her sister Kanak Munjari Dasee were unmarried daughters they were entitled to share equally her property, inasmuch as it was *stridhan*. She claimed that she was not bound by the said sale.

The respondent's claim to a moiety of her mother's *stridhan* is admitted to be good in law so that the only question in the suit is whether the conveyance was valid. It is plain that at the date of this conveyance the property was still in the hands of the sole surviving executor, Hemendra Nath Bysack and therefore he was competent as executor to sell it to the appellants, who were *bona fide* purchasers for value. But the respondent contends that although Hemendra Nath Bysack was in a position validly to convey it to the appellants as such executor, and did purport to convey it he did not effectively do so, because the deed shows that he intended only to convey as a beneficial owner of the property, being under the impression that he and his two brothers, the co-vendors were beneficially entitled to it as heirs to their mother, and being ignorant or forgetful of the right of the sisters to inherit in preference to them. It is on this ground alone that the High Court decided in favour of the respondent, reversing the decision of the Judge of the Court below, who had held that Hemendra Nath Bysack had by the deed conveyed all the right and title he possessed in every capacity, including that of sole surviving executor of the will of Prem Chand Bysack.

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Then Lordships are of opinion that the judgment of the Judge of first instance was right and ought to have been affirmed by the Court of Appeal. In the first place the deed itself gives abundant evidence that the position of Hemendra Nath Bysack as sole surviving executor was viewed as material by the parties to the conveyance, inasmuch as there are careful recitals as to the original appointment of executors and as to the death of his co-executors. His position as sole surviving executor could have no bearing on the conveyance if it were not that it affected, or might affect, his title to convey. But even in the absence of such direct evidence that the conveyance was by him in his capacity as executor as well as beneficial owner (if and to the extent that he was such owner) the deed makes it clear that all the vendors convey all the title and right that they possessed in the property, and that would undoubtedly include the right and title which one of them possessed as executor. That this would be the ordinary rule is admitted by the Judges of the Court of Appeal, who base their judgment on what they consider to be indications in the deed and in the conduct of the parties that the intention was that only the beneficial interest possessed by the vendors should be conveyed. Then Lordships are of opinion that this would be to contradict the deed itself; and, moreover, they are of opinion that the matters referred to would not support the conclusion drawn therefrom by the Judges of the High Court even if it was permissible to permit such considerations to affect the interpretation of the deed.

If the deed be considered from the point of view of the appellants who were the purchasers and who were not otherwise concerned with the property or its history, the transaction, as well as the deed which carries it out, become perfectly clear and intelligible.

The property was by the will charged with two annuities, and in order that the executor might procure the funds necessary to pay the costs of past litigation the property was under mortgage. This mortgage was being called in and the sale was to enable the mortgage money to be raised. The purchasers naturally desired a clear title free from entanglements. They therefore required that the mortgage should be paid off and the annuitants settled with or security given against their claims. For both these purposes it was necessary that Hemendra Nath Bysack as executor should be a party to the deed, because the original mortgage was effected by him for the purpose of securing the costs for which he was of course liable, and on his discharging the indebtedness as to costs he would become entitled to claim for the same as against the estate including the house in question. Moreover, it is abundantly clear from the executor's accounts and from all the facts appearing in the record that the house still formed part of the undivided estate and that therefore he would be liable to pay the annuitants the amount of their annuities from time to time, as he had been doing for years past. The purchasers would not be likely to trouble themselves as to the question of whether or not the property would ultimately go to the sons or daughters, but would take care that all the persons in whom title could in any wise exist should join in the conveyance, and that they should be guaranteed against claims from those who did not do so. This is what the deed shows to have been done, and it would be entirely contrary to settled principles of law as well as most unjust to *bona fide* purchasers if the Courts were to allow its plain legal interpretation to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some

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or all of the parties to the conveyance at the date of its execution. The deed states plainly that whatever right or title the vendors possess is to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in its natural sense. From this wholesome rule their Lordships see no reason for departing in the present case.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed and that the judgment of the Court of Appeal should be set aside, with costs, and the judgment of the Judge of first instance restored. The respondents will pay the costs of this appeal.

Appeal allowed

Solicitors for the appellants: *Barrow, Rogers & Nevill*

Solicitors for the respondent: *Burton, Yates & Hart*

J V W

APPELLATE CIVIL.

Before Holmwood and Chapman JJ

INTU MEAH MISTRY

v

DARBUKSH BHUIYAN *

1914

May 15

Summons—Service of summons—Indian Marine Service—Civil Procedure Code (Act V of 1908) O V rr 15 17 and 27—Ex parte decree—Officer or mechanic in the employ of the Indian Marine

Under the Civil Procedure Code an officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as any other person as regards service of summons. They come within the operation of rules 15 and 17 of Order V of the Code of Civil Procedure.

APPEAL by Intu Meah Mistry, the petitioner.

This appeal arises out of the order of the Subordinate Judge of Chittagong rejecting the appellant's application to set aside an *ex parte* decree passed on the 28th of July 1909.

It appears that this litigation began in 1907 and that a decree was passed on the 14th of March 1908 in favour of 5 persons among whom the appellant was defendant No 2. But upon appeal the Subordinate Judge reversed the Munsifs decision and found against the defendants. The defendant No 1 who is proved to be joint with the defendant No 2, preferred an appeal to the High Court and that appeal was summarily dismissed. During the pendency of the appeal in the High Court, defendant No 2, the present appellant applied to the Subordinate Judge to have his appeal re-heard by him. The Subordinate

* Appeal from Original order No 49 of 1912 against the order of J M Sarkar Subordinate Judge of Chittagong, dated Dec 16 1911.

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Judge held that he had no jurisdiction to entertain the application. On appeal to this Court a Divisional Bench held that the Subordinate Judge had jurisdiction to decide the matter and he, accordingly on the 16th of December 1911 decided against the application made by defendant No 2.

In his application the defendant No 2 stated that he was employed as driver in H M *Rob Roy* and that he was all along away at Rangoon and that he had no knowledge of the institution of any appeal.

Aggrieved by the order of the Subordinate Judge defendant No 2 appealed to this Court.

Babu Bepin Behari Ghose (with him *Babu Probodh Kumar Dass* and *Babu Khutish Chandra Chakravarti*), for the appellant, submitted that the appellant having admittedly been at Rangoon, no notice of the appeal in question was served upon him. The serving officer did not exercise the due and reasonable care required of him. Referred to O V, 11 and 17 of the Code of Civil Procedure *Sahayam Bhaskar v Padamkar Mahadeo* (1).

[HOLMWOOD J. What is the special procedure for service of summons upon a person belonging to the Indian Marine Service?]

There is no provision in the Code regarding the service of summons upon members of the Indian Marine Service. The serving officer did not make any enquiries from the members of the appellant's family as to where he was then residing.

His address could easily have been ascertained and notice duly served upon him.

Babu Surendra Nath Guha, for the respondent, submitted that the present application for rehearing was not a *bond fide* one. The defendant No 1, who

appeared and contested the appeal, was joint with defendant No 2. He set up a false story that he was separate from his brother. At the time of the service of notice appellant's wife, brother and nephew were residing at the ancestral house. Referred to O V, 15 of the Code of Civil Procedure. According to 15 the service was a good service. There was no special provision for service of notice upon officers of the Indian Marine, and, therefore, rule 15 applied.

Regarding the meaning of the word residence, see *Kumud Nath Roy Chowdhury v. Jotindra Nath Chowdhury* (1). The defendant No 2 was in correspondence with defendant No 1 and his wife, and it would be impossible to believe that he had no notice of the appeal.

Babu Bepin Behari Ghose, in reply.

HOLMWOOD AND CHAPMAN JJ. This is an appeal from the order of the Subordinate Judge of Chittagong rejecting the appellant's application to set aside an *ex parte* decree of the 28th July 1909.

It appears that this litigation began in 1907 and that a decree was passed on the 14th March 1908 by the Munsif in favour of 5 persons among whom the appellant was the defendant No 2. But upon appeal the learned Subordinate Judge in the Court below reversed the Munsif's decision and found against the five defendants. The defendant No 1 who is proved to be joint with the defendant No 2 preferred an appeal to the High Court and that appeal was summarily dismissed. The defendant No 2 the present appellant, applied to the learned Subordinate Judge during the pendency of the appeal in the High Court to have his appeal re-heard by the Subordinate Judge

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IN-TO MEAN
MISTRYDAB OF ASH
BUDHAN

The Subordinate Judge held that he had no jurisdiction to entertain the application. On appeal to this Court a Divisional Bench of this Court held that he had jurisdiction to decide the matter and he was the best person to decide it. He has accordingly on the 16th of December 1911 decided against the defendant No 2's application. The grounds which he has given appear on the face of them to be good, for it would appear from what he states not only that the provisions of the law contained in Order V, rules 15 and 17, were complied with but that the learned Judge satisfied himself that the defendant No 2 had an opportunity of appealing inasmuch as he was in communication with his wife, brother and nephew during his absence at Rangoon both before and after the service.

One new factor has arisen in the case, namely that in his application in this case he states that he is employed as a *mistry* or engine hand on H M S 'Rob Roy,' and it may therefore be that he belongs to the Indian Marine Service. It is a curious fact that by rule 27 of Order V, officers belonging to his Majesty's Military or Naval forces or his Majesty's Indian Marine Service are excluded from the discretion which is given to the Court of serving notice on public officers or servants of a Railway Company or local authority through the head of their office if that course is most convenient. There is a further rule (rule 23) that where the defendant is a soldier, the Court shall send summons for service to his Commanding Officer. In this state of the law the only conclusion we can come to is that the officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as every other person under the Code, and we cannot therefore go beyond the provisions of rules 15 and 17 in this case.

It is urged that there was no proper enquiry, and if the peon had made the least enquiry from the other members he must have learnt that defendant No 2 had gone back to Rangoon to join his employment. This might have some substance if defendant No 2 had succeeded in establishing what he sought to establish viz, that he had separated from his brother, defendant No 1, and from the other defendants after the Munsif's decision and that he had adverse interest to his brother, defendant No 1. But in this he appears to have put forward a false story, and the Subordinate Judge in the lower Court has clearly found that his story is false. That being so there is no other alternative but to accept the theory that defendant No 1 did accept service on behalf of his brother although he refused to sign the notice. That notice was duly posted up, as is found, upon the office-room door of the place where the family ordinarily resided, and at the time living in that house were the wife, the brother and nephew of the defendant No 2, and all these persons had correspondence with the defendant No 2 during the time that the negotiations for the prosecution of the appeal were going on. It is therefore impossible for us to hold that the defendant No 2 had not in fact notice of this appeal and his continuous attempts to have this case re-opened which has been going on for many years and when he is exactly in the same boat with his brother defendant No 1, do not appear to be *bona fide*. For these reasons, the appeal is dismissed with costs,

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RAGHUNATH DAS

v.

SUNDAR DAS KHETRI.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL]

Insolvency—Attachment under mortgage decree and order for sale of mortgaged property—Vesting order under s 7 of Insolvency Act (11 & 12 Vict, c 21), effect of—Sale after vesting order—Sale by Official Assignee to plaintiff—Title of purchaser from Official Assignee as against judgment creditor purchasing at sale in execution of his own decree—Notice

An attachment in execution of a money decree on a mortgage of land, followed by an order for sale of the interest of the judgment debtor does not create any charge on the land

Sarles v Burihoo Bhai (1) referred to

An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Indian Insolvency Act (11 & 12 Vict, c 21), and an order for sale though it finds the parties does not confer title

Previous to the 8th September 1904 a colliery leased to the judgment-debtors was attached under a mortgage decree by the respondents (judgment creditors) and an order for sale on 5th September was made, but at the request of the judgment debtors the sale was postponed until the 10th. On 8th September the judgment debtors filed their petition in the Insolvency Court in Calcutta and the usual vesting order was made on the same day. On 12th September the execution proceedings were stayed. After issue of notice, on the application of the respondents, to the Official Assignee to show cause why he should not be substituted in the place of the judgment-debtors, the Subordinate Judge on 10th January 1905, finding that the notice had been duly served, made the order for substitution and fixed the sale for 6th March 1905, on which day the property was sold, and purchased

^o Present LORD MOLTEN, LORD PARKER, SIR JOHN EDGE AND MR. AMER ALI

by the respondents who in June were put into possession. Meanwhile on 23rd Mar 1905 the Official Assignee with leave from the Insolvency Court in March 1908 sold the property to a purchaser, who on 24th June 1908 sold it to the plaintiffs by whom on 16th July 1908 the present suit was brought for possession of the colliery.

Held (reversing the decision of the High Court) that the notice calling on the Official Assignee to show cause why he should not be substituted for the judgment debtors was not a proper notice under section 248 of the Civil Procedure Code, 1882. A notice under that section should have called on him to show cause why the decree should not be executed against him. But assuming the notice to have been duly served (which was denied) the sale was altogether irregular and inoperative. The property having vested in the Official Assignee it was wrong to allow the sale to proceed at all. The judgment creditors had no charge on the land and the Court could not properly give them such a charge at the expense of the other creditors of the insolvent. In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which had been done. In the third place the judgment debtors had, at the time of the sale, no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property.

Mallarjun v. Narhari (1) distinguished.

No proper notice was served under section 248 of the Civil Procedure Code, and the respondents had full notice, and were responsible for the irregularities of the procedure adopted.

APPEAL 98 of 1913 from a judgment and decree (4th June 1912) of the High Court at Calcutta, which reversed a judgment and decree (8th September 1909) of the Court of the Subordinate Judge of Bardwan.

The plaintiffs were the appellants to His Majesty in Council.

The main question for determination in this appeal was as to whether the title to certain lease-hold interests in a colliery, together with its equipment, engines, boilers, offices, etc., is in the appellants who were purchasers from the Official Assignee of Bengal, or in the respondents (defendants) who were

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purchasers in execution of a decree. The Subordinate Judge gave a decree for the plaintiffs.

The judgment appealed from (CHITTY and TEUNON JJ), where the facts of the case are sufficiently stated, was as follows —

"On 1st December 1899 the defendants granted a pottah of coal lands to Atul Nath Chatterji and Rajendra Nath Chatterji at an annual jama of Rs 3,626 11 10 and a salam of Rs 4 001. The lessees were two of four brothers, the others being Aghore Nath Chatterji and Chandra Nath Chatterji. The four brothers who were members of a joint family, became heavily indebted to several creditors. On 6th December 1903, the present defendants filed a suit against their lessees for rent under the pottah and, on 23rd June 1904 obtained a decree against them for Rs 3,090 10 6 and costs Rs 350 7 annas. The other two brothers were also parties to that suit as *pro forma* defendants. On 13th July 1904 the defendants applied for execution of their decree by attachment of the immovable properties belonging to the judgment debtors. The lease hold property was accordingly attached and 5th September 1904 was fixed for the sale. On that day, the judgment debtors Nos 1 and 2 applied for time to enable them to raise money by sale of the attached property, and the sale was accordingly adjourned until 10th September. On the 8th September all four brothers filed their petition in the Court for the Relief of Insolvent Debtors at Calcutta and on the same day the Court made the usual vesting order under section 7 of the Indian Insolvent Act. On 30th September 1904, the defendants applied to the Subordinate Judge of Burdwan to substitute the Official Assignee in the place of the judgment debtors in the execution proceedings under their decree. On 23rd November, notice was ordered to issue to the Official Assignee to show cause why he should not be substituted in the place of the judgment debtors and it was made returnable on 22nd December 1904. On 10th January 1905 the Subordinate Judge, finding that Mr. Miller had been duly served with the notice, ordered that he be substituted in the place of the judgment debtors and 6th March 1905 was fixed for the sale of the attached property. On that day the property was sold and purchased by the defendants the decree holders. On 18th April 1905, the sale was confirmed and on the 14th June 1905, an order was made for delivery of possession to the defendants as purchasers and they accordingly took possession under it. Meanwhile, on the 23rd May 1905, the Official Assignee applied to the Insolvency Court and obtained an order that he should file at liberty to sell either by public auction or private contract to the best purchaser the properties of the insolvents including the lease hold premises in question. He did not, as a matter of fact, sell at

that time, but, on the 24th March, 1908, he sold the premises now in question to Hormusji Pestonji Banker *alias* Billimoria, a Parsi gentleman of Asansole. On the 24th June 1908 three months later, Banker sold the property to the present plaintiffs. On 16th July 1908, this suit was instituted to recover possession of the property.

"The learned Subordinate Judge has decreed the plaintiffs' suit and the defendants have appealed.

"The first question is one of fact—whether the notice for substitution was duly served on the Official Assignee in the execution case. The Judge says that it is shown to have been served on a clerk of the Official Assignee and, in the absence of evidence to show that this amounted to service on the Official Assignee or that the clerk had authority to receive it he finds that it was not properly served. This finding appears to us to be entirely against the evidence on the record. The clerk of the Official Assignee, Lakhinarayan Dhar, states that he has been an Assistant in the Official Assignee's office for 29 years. He admits that the notice was served in that office and that he signed acknowledging the receipt. He states that he received the notice on behalf of the Official Assignee, and made over the copy to Mr Langer, the Head Assistant. The Small Cause Court bailiff (who has been a bailiff for 30 years and who served the notice) says that he has known Lakhinarayan Babu as the head clerk or Bara Babu for 20 years and that he served notices for the Official Assignee upon him 20 or 30 times. He states that he always served notices for Mr A. B. Miller on Lakhinarayan Dhar in this manner. There can be no question on this evidence that the notice was served in the Official Assignee's office in the usual way and in the absence of any evidence to the contrary we must presume that Lakhinarayan Dhar was a person authorised to receive such notices within the meaning of section 75 of the Code of the Civil Procedure of 1882. It would have been ample for the opposite party to have called evidence from the Official Assignee's office to disprove this, had it been incorrect. We therefore hold that the notice for the substitution was duly served on the Official Assignee.

"The next question is what was the effect of the sale in execution as against the Official Assignee. It was argued for the defendants (i) that the Official Assignee was bound by the execution proceedings and by the sale which took place as we have stated (ii) that the lease hold interest did not vest in the Official Assignee because he did not take possession, and (iii) that the decree being one for rent the decree holders were entitled to sell the lease hold interest of the insolvents and to give a good title.

"(i) With regard to the first question, it must be conceded that the order for substituting the Official Assignee in place of the judgment debtors in the execution proceedings was incorrect see the case of *Miller v.*

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Budhsingh Duthuria (1) But the Official Assignee having been added and having taken no exception to the procedure, the sale must be regarded as having taken place in his presence and as binding upon him. The fact that a person who was not the representative of the judgment debtors was brought upon the record as such representative, would not affect the validity of the sale see *Mallajun v Varkari* (2). The Official Assignee having taken no steps to have that sale set aside in the manner provided by law, the sale must be taken to be good as against him.

(ii) We cannot accept the second contention raised by the learned pleader for the defendants that the property had not vested in the Official Assignee. It is true that in cases of leasehold property, the Official Assignee has the right to elect whether or not he will accept the property under the vesting order. If he does so there is no question that his acceptance relates back to the date of the vesting order, see *Abdul Razak v Herman* (3). That was the converse case and the question there was whether the Official Assignee could be made liable for the rent of the leasehold property. It was held that inasmuch as he had taken possession, he must be regarded as having elected to take over the property. Here, he paid no rent nor did he take actual possession but the property did vest in him by the vesting order and that he regarded it as having vested in him is made plain by the application which he made to the Insolvency Court on the 23rd May 1903 for leave to sell the property. He could not sell it unless it were vested in him. That being so we must hold that the sale was effective as against the Official Assignee and also against the plaintiffs who claim through him. The plaintiffs are in fact in a dilemma. If the property had not then vested in the Official Assignee, it was sold away before the Official Assignee acquired any title to it, if it had vested in him—and we think that it had—it was sold in his presence and the sale was binding on him.

The High Court held that it was unnecessary to decide the 3rd point, and the appeal was allowed and the suit dismissed with costs.

On this appeal,

De Gruyther K C and *A. M. Dunne*, for the appellants, contended that they had established a good title

(1) (1890) 1 L. R. 18 Cal. 43.

(3) (1893) 1 L. R. 22 Bom. 617.

(2) (1900) 1 L. R. 25 Bom. 337.

L. R. 27 L. A. 216.

to the property in suit. The proceedings in execution subsequent to the insolvency of the judgment-debtors, and the sale of 6th March 1905 were without jurisdiction, *ultra vires*, and invalid, and passed no title to the respondents. The Insolvency Act (11 & 12 Vict., c. 21) section 7 under which the vesting order was made, was referred to. In India an attachment of property and an order to sell it did not affect the title of the Official Assignee. Was it different where he had been made a party? It was submitted not. A judgment-creditor had no priority over the Official Assignee in respect of property attached by him prior to the vesting order. *Pearcock v Madan Gopal* (1). The proper proceedings to make the Official Assignee a party were not taken. He was served with a notice to show cause why he should not be substituted for the judgment-debtors in the suit. The procedure for substituting one person for another on the record was contained in chapter XXI, sections 370, 372 of the Civil Procedure Code 1882, that section (372) applied where the substituted party represented the other, but there was no provision for making the Official Assignee a defendant in place of the judgment-debtors whom he did not represent see *Muller v Bulh Singh Dhudhuria* (2). The Official Assignee represented rather the interests of the creditors for the benefit of whom the insolvent's estate was vested in him. Those sections were not applicable in execution of decree. *Goodall v. Mussoorie Bank* (3). The substitution of the Official Assignee would have no effect on the sale; what was ordered to be sold was the right, title and interest of the judgment-debtors, and that was not altered by the substitution, the purchaser took nothing as after the making of the vesting order the

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(1) (1912) I I II 29 Calc 428 (2) (1890) I L II 18 Calc 43

(3) (1887) I L R 10 All 97.

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judgment debtors had no interest that could be sold. The position of the Official Assignee was shown by the case of *In re Hunt Monnet & Co Lx parte Gamble v Bholagun Manjur*(1) and section 49 of the Insolvency Act was referred to. He could apply for stay of execution and the word 'may' in that section meant 'shall'. A notice might have been served on him under section 248 of the Code of Civil Procedure to show cause why the decree should not be executed but he received no notice except for the substitution of his name in place of the judgment debtors which was wrong *Jitmand Ramanand v Ramchand Nandiam*(2) and *Krishnaswamy Mudaliar v Official Assignee of Madras* (3) which both followed the case of *Peacock v Madan Gopal*(4) and also Civil Procedure Code 1882 sections 284 287 291 and 316 were referred to. The proclamation of sale only referred to the right title and interest of the judgment-debtors there was no power in the Court to make a fresh order for sale of the Official Assignee's interest and even if there was power to do it such an order was not made.

B. Dulé for the respondents contended that the appellants had tried to make out an entirely new case. The notice of the execution proceedings the evidence showed was duly served on the Official Assignee under sections 73 91 and 92 of the Civil Procedure Code, and the sale took place in his presence. He represented the judgment-debtors under section 214 of the Civil Procedure Code. It was settled law that where a person has been made a party to execution proceedings his only remedy in such a case as this was under section 211 that was a suit to set aside the sale under section 311 but that had to be done within a year.

(1) (1914) 1 Bom H C 251

(3) (1903) 1 I L J 26 Mal 173

(2) (1905) 1 I L J 29 Bom 405

(4) (1902) 1 I L J 29 Cal 428

after the sale. As to the notice to the Official Assignee even if it were wrongly served, such an irregularity was a matter which could be dealt with in execution of decree under section 244 of the Code. Reference was made to *Malkaryun v Narhari*(1), *Prosunno Kumar Sanyal v. Kali Das Sanyal*(2) and *Punchanun Bundopadhyay v Rabia Bibi*(3). It must be presumed that the notice was duly served. As to notice under section 248 of the Civil Procedure Code, reference was made to *Bimola Sundaree Dassee v Kalee Kishen Mozoomdar* (4). It was now too late to set aside the sale. An application to do so was barred by limitation under Article 12 of Schedule II of the Limitation Act 1877.

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De Gruyther K C replied

The judgment of their Lordships was delivered by

LORD PARKER. The action in which this appeal arises is an action for the recovery of a leasehold colliery. The plaintiffs (the present appellants) claimed title to the property under the Official Assignee in the insolvency of the lessees. The order vesting the property in such Official Assignee was made under the Insolvent Debtors (India) Act, 1848, on the 8th September 1904. At the date of this order, the colliery had been attached in execution case No. 303 of 1901, in which the lessees were the judgment-debtors and the defendants (the present respondents) were the judgment-creditors, and an order had been obtained for the sale of the interest therein of the judgment-debtors. Counsel for the respondents admitted that attachment in execution of

May 18

- (1) (1900) I L R 25 Bom 337 346 (3) (1890) I L R 17 Cal 711
L R 27 I A 216, 224 (4) (1874) 22 W R 6
(2) (1892) I L R, 19 Cal 683
L II 19 I A 106

NOTE.—[In the case of a civil officer being appointed to perform the judicial duties and a military officer the executive duties in addition, in each case, to the duties of his own appointment, the allowance will be equally divided between the two officers.]

Military Officer.

174. The allowances for his Civil duties of a Military officer appointed to officiate in a Civil office other than a Cantonment Magistracy without being relieved of his Military duty, are regulated in accordance with Article 168 and Rule 2 under it, and are drawn in the Civil Department. If he has no substantive appointment in the Military Department, the pay of his rank is held to be his substantive pay for the purposes of Article 168.

NOTE.—[This Article does not apply to cases of medical appointments falling under Article 170.]

Chapter IX.—Joining Time.

175. Joining time is the time allowed to an officer to proceed from one station to another when his appointment is changed, or when, being unemployed, he is appointed to any office. An officer is held to be on duty during Joining Time if he is entitled to allowances.

176. Only one day is allowed for joining an appointment which does not necessarily involve a change of residence from one station to another.

NOTE.—[Sundays are included in the calculation of the joining time of one day admissible under this Article. An officer who gives over charge on Saturday forenoon must, therefore, take charge on Saturday afternoon, and an officer who gives over charge on Saturday afternoon must take charge on Monday forenoon.]

177. In cases involving a change of station, Joining Time is calculated as follows, subject to a maximum of thirty days.—

(i) Six days for preparation; and, in addition thereto:—

For the portion of the journey which the officer travels or might travel—	a day for each—	
By railway	250 miles	
By ocean steamer	200 "	} or any longer time actually occupied in the journey.
By river steamers	80 "	
By motor car plying for public hire	80 "	
By mail cart or other public stage conveyance drawn by horses	80 "	
In any other way	III "	

An extra day is allowed for any fraction of distance over that prescribed.

(ii) When part of the journey is by steamer, the days intervening between the officer being set free from his office, or, if he has no office, receiving his orders, and the departure of the steamer or his start duly regulated to catch the steamer, shall be added.

NOTE 1.—[Sundays are not included in the above calculations, though they are included in the maximum limit of thirty days.]

NOTE 2.—[A journey by road of five miles or under to or from a railway station from or to the point which may be prescribed under Article 99S does not count for joining time.]

NOTE 3.—[An officer whose salary does not exceed Rs. 100 a month, should not ordinarily be required to travel by mail cart or other public stage conveyance drawn by horses.]

178. By whatever route the officer travels, his Joining Time shall, unless the Local Government specially permit otherwise, be calculated by the route which travellers habitually use.

NOTE—[The Local Government may delegate its powers under this Article to Heads of Departments.]

179. If an officer is authorised under Article 53 to make over charge of an office elsewhere than at its head-quarters, any joining time to which he may be entitled shall be reckoned from the place at which he actually makes over charge.

Extensions.

180. (a) The Local Government may in any case extend the joining time admissible by rule provided the general spirit of the rules is observed.

(b) Within the maximum of thirty days, Heads of Departments and Commissioners of Divisions, in the case of officers of Provincial Services and non-gazetted subordinates under their control, may extend the joining time admissible by rule—

- (i) if the officer has been unable to avail himself of the usual mode of travelling, or if, notwithstanding due diligence on his part, the journey has occupied more time than is allowed by the rules—to the extent of the time actually taken :
- (ii) if such extension is considered necessary for the public convenience or for the saving of public expense, as, for example, to prevent unnecessary and merely formal transfers—to the extent necessary :
- (iii) if the rules have in any particular case operated harshly, as, for example, if an officer has through no fault on his part missed a steamer or fallen sick on the journey—to the extent necessary, on such conditions as to allowances or otherwise as the sanctioning authority may think fit.

NOTE—[A Local Government may delegate the powers of Heads of Departments under clause (b) of this Article to other subordinate authorities in respect of non-gazetted officers serving under the latter.]

181. The Audit Officer shall move the Local Government to report to the Government of India any concession made under the preceding Article, which appears to him contrary to the spirit of the rules. The Local Government may not, finally, overrule the Audit Officer without a reference to the Governor General in Council.

When Leave intervenes.

182. When an officer, after giving over charge of his office at one station on transfer, or reversion to another office, takes Privilege or Examination leave before joining the office to which he has been transferred, or to which he has reverted, or when an officer, while on Privilege or Examination leave, is transferred to a station other than that from which he took leave, he is entitled to Joining Time in addition to his Privilege or Examina-

tion leave. The Joining Time of an officer transferred during Privilege or Examination leave will be counted from his old station, or from the place where he receives the order of transfer, whichever calculation would entitle him to the less Joining Time.

183. If an officer, during transit from one appointment to another, obtains Furlough on medical certificate (with or without Privilege leave or Subsidiary leave prefixed), he may be allowed only the Joining Time calculated for the journey from his old station to the furthest place to which he has proceeded on his route to his new station

Appointment Changed.

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Allowances.

185. Except in the case mentioned in Article 188, an officer draws, during Joining Time, the pay or salary which he drew in his old appointment or that which he will draw on joining his new appointment, whichever is less : Provided that an officer transferred from one officiating appointment to another shall not draw any time if he had not a superior lien on either to that of the officer relieved by or relieved to tentage in his old appointment and tentage is also attached to his new appointment, he is entitled to the same rates. If the account of his district, provided him the same during joining time. Provided that, if the rates differ in the two appointments or parts of the local area, he may draw the lower rate only. If an officer drawing a duty allowance in one appointment is transferred to another appointment similarly carrying a duty allowance, he may draw the same during the period of transit provided that, if the rates differ, the allowance to which he is entitled is the lower of the two.

NOTE.—An officer transferred from service under His Majesty's Government in the United Kingdom to service to which these Regulations apply draws, for the period of the voyage to India and from the date of debarkation to the date preceding that of assumption of charge, pay at the rate last drawn by him in his appointment under His Majesty's Government.

186. When, under Article 182, an officer combines Privilege or Examination leave and Joining Time, his allowances during Joining Time,—that is to say for the period, not exceeding the Joining Time admissible by rule, in excess of his Privilege or Examination leave, during which he is absent from duty,—must be calculated at the rate at which his Joining Time allowance would have been calculated if he had joined the office to which he is transferred directly.

187. If a member of the Indian Civil Service, on first arrival in India, is unable, from illness, to proceed to the seat of the Government to which he is attached or to any other station to which he is ordered to proceed direct, the Local Government in whose jurisdiction he is, may, on medical certificate, grant him a subsistence allowance of Rs. 250 a month for not more than two months. Time thus spent is not Active Service.

188. An officer who is not in the Indian Civil Service or in the Army, and who has no substantive appointment, is not entitled to any allowance during Joining Time; but if such an officer officiating in an office is transferred to another office under the same Local Government, the officer who orders the transfer may allow him to draw, during his transit, the allowance to which he would be entitled under the first sentence of Article 185.

Exceeding Joining Time.

189. An officer who does not join his new appointment within his Joining Time is entitled to no allowances after the end of his Joining Time, and

No. 3.

Page 51. Article 190.

Substitute the following for this Article:—

190. A ministerial officer transferred to service in another office is entitled to joining time under the rules in this Chapter and his service for leave and pension is not interrupted. But unless his transfer has been ordered for the public convenience he is not entitled to any allowances during joining time and the joining time does not count as service for leave or pension.

NOTE 1. [A transfer at the officer's request for his own advantage or in consequence of any fault on his part is not a transfer for the public convenience within the meaning of this Article.]

NOTE 2. [The procedure laid down in article 1099 should be followed when an officer is transferred otherwise than for the public convenience.]

(6th Edition—2nd Reprint, No. 3, dated 3-4-18.)

191. A member of the Indian Civil Service is entitled when under suspension to the subsistence allowance of his rank, and a Military officer in Civil employ to the pay and allowances of his rank.

Other Officers.

192. Saving as provided in Article 193 (b), an officer under suspension is entitled to no salary while he is absent from duty, and the salary of an officer who is dismissed ceases absolutely from the date of his dismissal, no allowances may be granted for any period occupied in the prosecution of appeals against the order of dismissal.

193. (a) A subsistence allowance, at a rate not exceeding one quarter of his salary, may be granted by the authority suspending him to an officer removed from office pending enquiry into his alleged misconduct. Provided that the subsistence allowance of a European should not commonly be less than Rs. 25 a month: if his salary be less than Rs. 100 a month, the rate may

193A-5] OFFICERS DISMISSED, SUSPENDED, OR IMPRISONED. [CHAP. X.

be increased accordingly. An officer of the Marine Department, whose duties are not confined to the shore, will draw, in addition to the subsistence allowance, rations, or, when rations are not issued, compensation in lieu thereof.

(b) If the suspension of an officer as a penalty for misconduct is, upon reconsideration or appeal, held to have been unjustifiable or not wholly justifiable, or if an officer dismissed from office or suspended pending enquiry into his alleged misconduct is, upon reconsideration or appeal, reinstated, then the revising or appellate authority may grant to the officer for the period of his absence from duty—

(i) If the officer is honourably acquitted, an allowance equal to the full salary to which he would have been entitled if he had continued to hold the appointment from which he was dismissed, and also, by an order to be separately recorded, any conveyance or local or other allowance of which he may have been in receipt prior to his suspension or dismissal.

(ii) Otherwise, an allowance equal to such proportion of the full salary and other allowances as aforesaid, as the revising or appellate authority may deem expedient.

(c) No extra cost may ordinarily be imposed on the State by the grant of an allowance under either clause (a) or clause (b) without the permission of the Local Government. In cases however where it does not exceed Rs. 500 and where the period during which the officer has remained unemployed through suspension or dismissal does not exceed six months, the excess expenditure may be admitted on the sanction of the authority mentioned in clause (a) or in clause (b) as the case may be.

- NOTE.—[The subsistence allowance referred to in clause (a) is authorized as a matter of grace only, and cannot be claimed as of right.]

193A. The preceding Article applies also to officers in temporary employ, but in deciding whether an allowance should be granted to such officers, the period for which the temporary appointment has been sanctioned should be taken into consideration.

Committals to Prison.

194. A servant of Government committed to prison either for debt or on a criminal charge, should be considered as under suspension from the date of his arrest, and not allowed to draw any pay until the termination of the proceedings against him, when an adjustment of his allowances should be made according to the circumstances of the case, the full amount being given only in the event of the officer being acquitted of blame or (if the imprisonment was for debt), of its being proved that the officer's liability arose from circumstances beyond his control.

Leave while under Suspension.

195. Leave of absence for a definite period is not admissible to an officer who has been suspended from duty. If permission to proceed to England is granted in such a case, it should only be for such period as the Secretary of State may determine.

PART III.—LEAVE RULES.

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PART III.—LEAVE RULES.

Chapter XI.—General Conditions of Leave.

SECTION I.—GENERAL RULES.

196. The rules in this Chapter apply to all officers in Civil employ except in as far as they are inconsistent with, or overridden by, the special conditions of leave which obtain in the case of the following classes of officers :—

- (a) Lieutenant-Governors and Members of Council (see Chapter XXII).
- (b) Judges of the High Courts (see Chapter XXIII).
- (c) Barristers and Pleaders holding the appointments specified in Article 547 (see Chapter XXIV).
- (d) Statutory Civil Servants (see Chapter XXVI).
- (e) Ecclesiastical Officers (see Chapter XXVII).
- (f) Officers subject to the Military Leave Rules (see Chapter XXVIII).
- (g) Army Veterinary Officers of the Civil Veterinary Department (see Chapter XXIX).
- (h) Law Officers (see Chapter XXXI).
- (i) State Railway Establishments (see Chapter XXXII).
- (j) Bengal Covenanted Pilot Service (see Chapter XXXIII).
- (k) Port Blair Police (see Chapter XXXIV).
- (l) Assam and Dacca Military Police (see Chapter XXXV).
- (m) Calcutta and Suburban Police Forces (see Chapter XXXVI).
- (n) Burma Military Police (see Chapter XXXVII).
- (o) Officers serving under Special Contracts (their contract).

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NOTE.—[If the health of an officer who is serving under an agreement which does not give a title to leave until the expiry of a fixed period fails during that period, his engagement should be terminated, unless—

- (i) he has exhibited such special ability that it is desirable on public grounds to retain him even at the cost of the difference between a leave allowance and any passage money, etc., due under his agreement; and
- (ii) it is certified that he will in all probability be able to return to duty at or before the end of six months.

In cases in which the engagement is not terminated, leave may be granted for a period not exceeding six months and on allowances not exceeding half pay.]

Discretion of Government.

197. (a) Leave of absence cannot be claimed as of right. Nothing in these Regulations must be understood to limit the free discretion of the Government to refuse, or revoke, leave of absence of any description, at any time according to the exigencies of the public service.

(b) The Local Government may refuse to grant the full amount of leave applied for in any case, and should, by the exercise of this power, so regulate the date of an officer's return from leave as to cause as little change as possible in administrative arrangements.

(c) This Article gives Local Governments ample powers for regulating leave of every description, and in dealing with applications for leave the following instructions should be carefully borne in mind :—

1. *Extract from Circular No. 42, Home Department, No. 22 (D. Secy) dated 16th Nov. 1883*

2.—*Home Department No. 513 (Public), dated 16th April 1883.*—"Two Military officers having applied for ordinary furlough within a short period after their transfer to employment in the Civil Department,—namely, before they had completed one year's service in that

was accordingly approved."

Maximum Leave Admissible.

198. After five years' continuous absence, whether with or without leave, an officer is considered to be out of Government employ. But this rule may, on public grounds and with the sanction of the Secretary of State in Council, be relaxed in the case of any Civil officer other than a member of the Indian Civil Service.

1. *Extract from Departmental Letter No. 2, Government of India, No. 24 J. & S. 1883 dated 1st April 1884*

NOTE 1.—[This Article does not apply to officers transferred to Foreign Service in India.]

NOTE 2.—[The Government of India have the power to relax the rule in this Article without a reference to the Secretary of State in the case of officers who are lent to Siam and who are not members of the Indian Civil Service.]

Recall from Leave.

199. An officer recalled to duty before the expiry of leave of any kind is entitled, if the return to duty is optional, to no concession save the

exception in Article 233 (iv). If the return to duty is compulsory he is entitled—

- (a) to take the balance of his leave, together with any leave which was admissible at the time of recall, or for which he has subsequently become eligible, as soon as he can be spared from duty; and
- (b) if the leave from which he is recalled is out of India—
 - (i) to the concessions in Articles 8 (iii) and 1127 subject to the conditions and limitations specified therein; and
 - (ii) to leave allowances during the voyage to India; and for the period from the date of landing in India to the date of joining his appointment, to the subsidiary leave allowance which he would have drawn had he not been recalled, but simply returned on the termination of his leave.
- (c) If the leave from which he is recalled is in India,—
 - (i) to the concessions in Article 1127 subject to the conditions and limitations specified therein;
 - (ii) to be treated (if the recall is from leave other than privilege leave) as on duty from the date on which he starts for the station to which he is ordered, but he is entitled until he rejoins his appointment to draw leave allowances only.

NOTE 1.—[All orders recalling an officer before the expiry of his leave should distinctly state whether the return to duty is optional or compulsory. Orders recalling an officer from leave out of India should be communicated to him officially through the Secretary of State.]

NOTE 2.—[The concession allowed by clause (a) of this Article ordinarily lapses on the grant

200. An officer who is on leave may not take service, or accept any employment which involves the receipt of a fee or honorarium, without obtaining the previous sanction of—

- (i) the Secretary of State, if the officer is residing in Europe, North Africa, America or the West Indies; and
- (ii) the Government of India, or the Local Government under which he is employed, as the case may be, if he is residing in India or in any place out of India not mentioned in clause (i); provided that when the officer is non-gazetted and is resident in India, the special permission of the officer empowered to appoint him is sufficient authority for the acceptance of such employment.

NOTE.—[This Article does not apply to the acceptance of fees for literary work or for service as an examiner or to similar employment. Nor does it apply to acceptance of foreign service during leave, which is governed by Article 761 of these Regulations.]

SECTION II.—SERVICE QUALIFYING FOR LEAVE.

Temporary Service.

201. Temporary and officiating service, if it counts for pension, counts also for leave.

NOTE.—[The rules providing for the grant of leave to an officer who has a temporary or officiating appointment only are contained in Articles 242, 336, Rule 1, and 339, Rule 2.]

Probationers and Apprentices.

202. (a) An officer appointed as probationer for a certain period before formal appointment is entitled to the same leave as if he held a substantive appointment.

1. Officers appointed under contract in England on probation in view to permanent service in India are entitled to leave as follows—

- (i) Officers appointed for three years or more (see Appendix No 33), the same leave as if they held permanent appointments.
- (ii) Officers appointed for less than three years (see Appendix No 33), privilege leave and if necessary, leave on medical certificate, not more than six months of such leave carrying allowances.

NOTE 1.—[Officers appointed in England to posts created temporarily but with the prospect more or less definite, of their being eventually made permanent, are entitled to leave under clause (i) of this rule, if they are otherwise qualified.]

NOTE 2.—[Leave on medical certificate under clause (i) or (ii) shall not be granted for a period extending beyond the term of an officer's contract unless or until it has been decided to retain him in permanent employment.]

NOTE 3.—[The Government of India have the power to revise Appendix 33 without reference to the Secretary of State.]

(b) Police probationers and temporary and officiating Assistant Superintendents of Police in all Provinces count their service as follows:—

- (1) If recruited in England—from the date on which they report their arrival in India.
- (2) If recruited in India under the orders in the Secretary of State's despatch No. 14, dated the 15th March 1894—from the date of assuming charge of their appointments.
- (3) If recruited in India before the date of the orders of 1894 mentioned in (2) above—from the date either of attaining the age of 20 years or of assuming charge of their appointments, whichever is later, provided that the service has been continuous.

(c) The service of—

- (1) Probationary, officiating and temporary Extra Assistant Commissioners in the Punjab and Assam, and

- (2) United Provinces,

- (3) Probationary, officiating and temporary Extra Assistant Commissioners in the Punjab and Assam, and

(4) Officiating and temporary Extra Assistant Commissioners in the Central Provinces,

counts for leave from the date on which all the three following conditions are fulfilled, namely,

- (a) two years' continuous probationary or officiating service as such has been rendered,
- (b) departmental examinations have been fully passed, and
- (c) the age of twenty years has been attained.

for leave the whole of their continuous service from the date of their first appointment in the Settlement Department]

203. (a) Service as an Apprentice does not qualify except in the following cases :—

Engineer or Examiner Apprentices,
Qualified students of the Thomason College under practical training. } in the Public Works or Railway Department.
Assistant Superintendent Apprentices in the Indian Telegraph Department.

The service of candidates in the Superior Revenue Establishment of State Railways counts towards leave after they are confirmed in their appointments.

(b) Apprentice Overseers in the Public Works or Railway Department and Apprentice Permanent-way Inspectors on State Railways may be allowed leave on medical certificate on half pay subject, in the case of Military Apprentices to the proviso that the leave allowance shall not be less than Military pay and allowances. An apprentice of either class counts his service as such for leave if on the termination of his apprenticeship he is appointed to the department.

Officers under Training.

203A. A Local Government may at its discretion decide, in the case of an officer who is selected to undergo a course of training whether the time spent in training shall count as service qualifying for leave; and also whether or not such time shall be regarded as an interruption entailing forfeiture of leave already earned.

NOTE 1—[The Local Government may delegate its power under this Article to Heads of Departments in respect of officers serving under them.]

NOTE 2—[A Local Government may issue general orders under this Article in regard to any specified class of officers under training.]

Service under other Rules.

204. An officer transferred to an office to which these rules apply is not entitled to Long Leave under them in respect of service rendered in an office to which they do not apply. But service in the Army which under Article 356 counts towards Civil pension qualifies also for leave under Civil rules. Any leave taken by an officer during such service will in the calculation of future leave be treated as if it had been taken under these Regulations.

Service before Discharge, Resignation, or Dismissal.

205. (a) An officer who is discharged on reduction of establishment from, or resigns, the public service and is re-employed after an interval, cannot, without the permission of the authority sanctioning the re-employment, count his former service towards leave.

(b) An officer who is dismissed or removed from the public service and who is reinstated on appeal, cannot count his former service towards leave unless the authority who, on revision or appeal, reverses the order of dismissal or removal, declares that his former qualifying service shall count.

Private Secretary.

206. Service as Private Secretary to the Governor-General, a Governor or a Lieutenant-Governor qualifies for leave, provided that the officer (before his appointment as Private Secretary) belonged to the Civil Service (whether the Indian Civil Service or not), or to the Indian Army, or to any of the Indian Establishments of the British Army.

207. After a continuous service of three years, a Private Secretary whose case is not provided for by the preceding Article, may be granted Leave on Medical Certificate to the extent of one year with a leave allowance equal to half his salary, and subject to a maximum of £1,000 a year.

Press Servants.

208. A Section-writer, or a Press servant, paid under the piece-work system, if granted leave, is not entitled to any allowance whatever during his absence.

Rule of Proportions.

209. The leave allowances of an officer not subject to the Foreign Service Rules (Part VII) who has served in any appointment the salary of which has been derived either wholly or in part otherwise than from Indian Revenues, is charged according to the Rule of Proportions.

SECTION III.—RETENTION OF APPOINTMENT.**Lien on Appointment.**

210. An officer on Privilege leave has a lien on his substantive appointment; he has also a lien on his officiating appointment, so long as it is not resumed by an officer having a superior lien on it.

211. (a) An officer under the European Service Leave Rules, on ordinary Furlough, or on Special leave, has a lien on his substantive appointment or on a substantive appointment of a like character and not less pay. He has no lien on an acting appointment.

(b) On other Furlough a member of the Indian Civil Service or a Military officer subject to the Civil Leave Rules, has no lien; but a Civil Engineer or other officer subject to the European Service Leave Rules has a lien. (See also Article 313.)

212. An officer on Long Leave under the Indian Service Leave Rules retains a lien on his substantive appointment, but has no lien on an acting appointment.

213. An officer on Subsidiary leave has or has not a lien on an appointment according as he has or has not such a lien on the first or last day, as the case may be, of the leave to which it is subsidiary.

NOTE.—[A Military officer subject to the Military Leave Rules does not lose his lien during Subsidiary leave preparatory to Furlough.]

214. An officer on leave may not surrender his lien on his substantive

215. An officer cannot obtain ordinary Furlough or Special leave unless he has a substantive appointment.

NOTE 1.—[A Military officer who has officiated continuously in the Civil Service for at least 3 years]

NOTE 2.—

Burma or Assam
the Military L

Compulsory Retirement.

216. If a Local Government decides, before an officer whom it has the power to remove from the service leaves India, that he shall not be permitted to return to duty in India, it should give notice to him before he leaves India, so that any remonstrance which he may wish to make may be considered on the spot by an authority fully cognizant of the facts of the case. Such notice should not be postponed until after the officer's departure, and then communicated to him through the Secretary of State.

217. If when an officer is going on leave out of India it is necessary to consider the propriety of removing him for incapacity, whether mental or physical, which is of such a nature that it is not possible to say, before his departure from India, whether it will be permanent or temporary, or if for any reason it is considered inexpedient that an officer who is on leave should return to India, the Local Government should report the circumstances fully (in the case of the Government of Madras, Bombay or Bengal direct; otherwise through the Government of India) to the Secretary of State. A

communication of this nature should not be made direct to the officer concerned. The report should be made in time to enable the Secretary of State to take any necessary measures before the officer would in ordinary course be permitted to return to duty, and in any case should reach the India Office at latest three months before the end of the officer's leave.

218. Articles 216 and 217 must not be understood to authorize the grant of Furlough to an officer who ought to be dismissed or removed from the service for misconduct or general incapacity.

Abolition of Appointment.

219 The abolition of the appointment of an officer absent on leave out of India should be immediately communicated to the Secretary of State.

SECTION IV.—COMMENCEMENT AND END OF LEAVE.

220 Ordinarily leave in India including Subsidiary leave, and leave out of India when Subsidiary leave is not taken, begins on the day on which transfer of charge is effected, or, if charge is transferred after noon, on the following day; similarly such leave ordinarily ends on the day preceding that on which the officer would have resumed charge after noon on that day. B the day
immedia day on
which the leave or the joining time between two appointments ends, an officer may leave his station at the close of the day before, or return to it at the end of, such holidays, provided his departure or return does not involve—

- (i) the immediate transfer of an officer from or to another station or the loss of his appointment by an officer appointed temporarily to the service.
- (ii) the taking over of money, unless, subject to the condition that the departing officer remains responsible for the money in his charge, the Local Government specially allows transfer of charge to take place before or after the holidays.

If holidays are as above prefixed to leave, the leave and consequent rearrangement of allowances, if any, take effect from the first day after the holidays on which the office is opened for business, and if holidays are affixed to leave or joining time, the leave or joining time is treated as having terminated on, and the rearrangement of allowances, if any, takes effect from the day on which the officer would have resumed charge had holidays not followed the leave or joining time.

In cases in which the application of the above rules as to prefixing and affixing holidays to leave is doubtful or inequitable, the Local Government shall decide which officer shall be held to have been in charge and to which the salary of the office for the Sunday or holiday shall be paid.

221. When Subsidiary leave is taken, Furlough and Special leave out of India begin on, and include, the day of the departure from the port where the officer first meets it of the vessel in which he sails. If an officer remains in India after the end of Subsidiary leave, his Furlough or Special leave dates from the beginning of his Subsidiary leave, unless he is specially exempted from forfeiture of his Subsidiary leave by his Local Government under the provision of Article 323 (b). Furlough and Special leave out of India end on, and include, the day before the arrival at the port where the officer last quits it of the vessel in which he returns, and Subsidiary leave begins the day after.

NOTE 1.—[The Furlough or Special leave of an officer sailing from Calcutta in a vessel which touches at Madras begins on the departure of the vessel from Calcutta, and not from Madras.]

NOTE 2.—[The day on which the vessel in which the officer sails quits her moorings or anchorage, whether she leaves the limits of the port or not on that day, is the day of the departure of the vessel. The day of arrival of the vessel in which the officer returns, is the day on which the vessel reaches her moorings or anchorage in port.]

221A. Special rules have been laid down in Appendix 6A for reckoning leave in the case of officers stationed in certain remote districts outside India.

222. An officer taking Furlough or Special leave out of India, whether by itself or in combination with Privilege leave, must report his embarkation, through the Audit Officer, to the Local Government (or other authority) which granted his leave, and his arrival in England to the Secretary of State.

SECTION V.—RETURN TO DUTY.

NOTE.—[With the exception of Article 231, this Section applies to Military officers in Civil employ subject to the Military Leave Rules.]

Permission to Return.

223. (a) An officer may not, without the permission of the authority which granted him leave, return to duty more than fourteen days before the end of Long Leave.

(b) Officers returning to India at times other than those fixed for them by their own Government, are liable to be kept on subsistence allowance until a suitable vacancy occurs to which to post them.

224. An officer on Long Leave in Europe, North Africa, America, or the West Indies must, if the leave was granted or has been extended on account of ill-health, whether it be technically leave on medical certificate or not, satisfy the Medical Board at the India Office as to his fitness to return to duty. Ordinarily he must attend at the India Office for examination by the Board, but, in special cases, particularly if he be residing at a distance of more than sixty miles from London, a certificate in a form to be obtained from the India Office from two medical practitioners may be accepted. On the required evidence of fitness being furnished, the officer will receive from the India Office permission to return to India. An officer whose leave was

not granted, and has not been extended, on medical grounds, does not require permission from the India Office to return to India. He must, however, take steps, either personally or through his agents, to obtain from the India Office a last-pay certificate, and should also inform the authority in India who granted him the leave, of the date on which he expects to return to duty, at least a month before he is due to arrive in India.

225. An officer who has taken leave on account of ill-health, whether the leave be technically leave on medical certificate or not, may, if he is residing in India or in any place not mentioned in Article 224, be required by the authority which granted the leave to produce, before he is permitted to return to duty, a medical certificate of fitness signed by such medical officer as the authority may direct.

226. An officer is not entitled, at the end of Long Leave or Subsidiary leave affixed thereto, to resume, as a matter of course, without further orders, the particular appointment which he vacated before his leave. He should report his return to duty as prescribed in Article 228 and await orders.

Change of Appointment.

227. If the . . . during Long Leave in India, he must . . . leave. But if he have not had sufficient . . . Government may allow him joining time. During such joining time his allowances will be the same as for Subsidiary leave on return from Furlough.

Report of Return.

228. A gazetted officer must report his return to duty to the Local Government under which he is employed. A member of the Indian Civil Service on the Bengal Establishment employed directly under the Government of India, returning from Long Leave, must also report his return to the Government of India in the Home Department.

Overstaying Leave.

- 229. An officer who remains absent after the end of his leave is entitled to no allowance for the period of such absence, and ceases to have a lien on any appointment,—

- (i) if his leave was Furlough without Medical Certificate under the European Service Leave Rules; or Furlough under the Indian Service Leave Rules,—immediately; and
- (ii) if it was Furlough on Medical Certificate, or Special Leave, under the European Service Leave Rules; Leave on Medical Certificate or on Private Affairs under the Indian Service Leave Rules; Vaca-

tion; or Privilege Leave,—after a week. In the case of officers to whom exception (ii) under Article 251 applies, the week commences from the end of the fifteen days mentioned therein.

NOTE 1.—[This Article does not affect the liability of an officer overstaying leave to forfeit past service under the rule in Article 420 (b).]

NOTE 2.—[Short extensions of leave may be granted retrospectively in India to officers who under certain specified circumstances overstay their leave. See Article 237(c).]

230. If the Local Government is satisfied that the default of an officer is due to circumstances beyond his control, it may exempt him from loss of appointment under the preceding Article, but not from loss of allowances during the period of his absence without leave. The Local Government may authorize the payment to an officer subject to the Indian Service Leave Rules of as much as it thinks fit of any allowances during Subsidiary leave under clause (ii) of Article 321 (a), to which he would have been entitled if he had not remained absent after the end of his Furlough, or Leave on Private Affairs, or Leave on Medical Certificate.

NOTE.—[The Local Government may delegate the power exercised by it under the first sentence of this Article to any subordinate authority in respect of officers to whom such authority is empowered to grant leave.]

231. So long as an officer retains a lien under Section III, or if he is exempted under the preceding Article from loss of appointment, absence after the end of his leave, though not counting as Continuous Service, does not operate as an interruption of Continuous Service or Continuous Active Service.

SECTION VI.—COMBINATION, EXTENSION AND COMMUTATION OF LEAVE.

232. No kind of leave, except Extraordinary leave under Articles 332 and 339, leave under Articles 199 (a), 233, and 288, and in certain cases Examination leave, can be granted in continuation of any other kind of leave; leave under Article 288 may also be followed by any other kind of leave. Any leave granted under these Regulations may be retrospectively granted for any other kind or period of leave for which the officer was qualified at the time when he was granted leave, provided that the officer has the power to do so.

Page 65. Article 232.

Add the following at the end of the first sentence of this Article:—
“and that under Article 288A by leave on medical certificate.”

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to Fur-

lough, Leave on Medical Certificate, Leave on Private Affairs, and Extraordinary leave without allowances, subject to the following conditions.—

- (i) when Privilege leave is combined with Furlough, the amount of the combined leave shall not exceed two years,
- (ii) when Privilege leave is combined with Special leave under the European Service Leave Rules or Leave on Private Affairs

under the Indian Service Leave Rules, the combined leave shall not exceed six months,

- (iii) when however, Furlough, Special leave, or Leave on Private Affairs, granted in combination with Privilege leave, is extended on medical certificate, the full period of Furlough, Special leave, or Leave on Private Affairs ordinarily admissible under rule may be allowed irrespective of the limits prescribed in clauses (i) and (ii);
- (iv) when Privilege leave is combined with leave of any kind, the combined leave must, except in cases falling under Article 199, be for not less than six months,
- (v) the periods mentioned in (i), (ii) and (iv) count from the beginning of the Privilege leave to the end (under the ordinary rules) of the leave with which it is combined.

NOTE 1 —[Clause (iii) of this Article does not apply to military officers in civil employ who are subject to the Military Leave Rules. In their case the rules in the Army Regulations limiting the total period of absence from duty, will apply.]

NOTE 2 —[If the maximum limit prescribed in clause (ii) or clause (i) of this Article (certificate) shall be dealt with before the end of the requirements of the leave is not more than 14 days before the end of the six months]

234 The grant of extension of Furlough, under Article 232 (otherwise than on medical certificate), is subject to proviso (v) under Article 308 (b).

235. If an officer subject to the Indian Service Leave Rules, who is absent on Leave on Private Affairs or on Furlough, takes in continuation Leave on Medical Certificate under Article 336, the whole of his absence is treated as leave under that Article.

236. Extraordinary leave without allowances cannot be converted retrospectively into Leave on Medical Certificate; but Leave on Medical Certificate may be given in continuation of Extraordinary leave without allowances.

Extension of Leave out of India.

237. (a) An officer absent on long leave in Europe, North Africa, America, or the West Indies, who wishes to have his leave extended or commuted must apply to the Secretary of State about three months before the expiration

to the extension or commutation desired. If the officer is on medical leave and desires an extension for more than 14 days, or if he is on other leave and desires an extension on medical grounds, he must satisfy the Medical Board at the India Office of the necessity for the extension. If application for

extension be delayed until the last two months of leave, advice of any extension granted for a period of more than seven days will be sent to India by telegraph and the cost of the telegram will ordinarily be charged to the officer.

1. In the case of a Commissioned Medical Officer, the Local Government should make a reference to the Director General, Indian Medical Service, before granting the permission.

(b) The Secretary of State reserves to himself the power of granting extension or commutation of leave to an officer in any case in which it appears to him that sufficient ground has been shown for the previous approval of the local Government not having been obtained before the application was made. In the event of the Secretary of State deciding to telegraph to India in regard to any such application, the cost of the telegrams to and from India will be charged to the applicant.

NOTE.—[The Secretary of State in granting extension of leave sometimes declines to guarantee retention of appointment, if there is no time to communicate with the Local Government in India.]

(c) The authority in India by which leave was originally granted is empowered, in any case in which it is satisfied that the non-return of an officer within the period of his leave was due to circumstances beyond his control, and of such a nature that an application to the Secretary of State for an extension was impossible before embarkation, or that the non-return was for administrative convenience, to sanction retrospectively extension of furlough or leave, if furlough or leave be due, up to a maximum period of 14 days. It is also empowered in the case of an officer returning from furlough on medical certificate or leave on medical certificate to sanction an extension, if the circumstances seem to require it, up to a maximum of 14 days inclusive of any short extension that may have been granted by the Secretary of State.

NOTE.—[This Article applies to officers who are on leave out of India on special duty in extension of the leave.]

(d) Furlough out of India on medical certificate may be commuted into leave without medical certificate if such leave was due at the time when the original Furlough was granted, and if the officer seeking commutation is certified, as prescribed in Article 224, to have recovered his health. When extension of the commuted Furlough is applied for, the application must be supported by evidence that the officer's Local Government consents to the extension of his leave.

Applications for extensions of commuted Furlough on medical certificate should be dealt with by Local Governments in such a way that officers who have preferential claims to Furlough under Article 310 are not thereby debarred for a considerable time from availing themselves of the Furlough at their credit.

NOTE.—[This Article applies to the placing of officers who are on leave out of India on special duty in extension of the leave.]

238. An officer on long leave in any place out of India not mentioned in Article 237 (a) who wishes to have his leave extended or commuted, must apply three months before the expiry of the leave to the authority in India

which granted it Whenever leave is extended or commuted under this Article, the fact should forthwith be notified by the Audit Officer to the Government of India in the Finance Department, in order that it may be communicated to the Secretary of State with a view to the payments by Colonial Treasurers or Staff Officers being checked

Privilege Leave.

239. When Privilege leave is, on medical certificate, retrospectively changed for Furlough out of India, so much of the leave passed before the departure of the vessel in which the officer sails may be treated as Subsidiary leave under clause (1) of Article 321 (a) as might have been granted as Subsidiary leave if the officer had originally obtained Furlough and not Privilege leave, notwithstanding that a portion of such retrospective Furlough has been passed in India.

NOTE.—[This Article will not apply when the subsequent order grants leave in continuation of the Privilege leave under Article 233.]

Military Officers.

240. In the case of a Military officer subject to the Military Leave Rules leave may be retrospectively commuted by the authority which granted it to any other kind of leave which the said authority would have been competent to allow when the original leave was sanctioned.

NOTE.—[Articles 237 to 239 apply to Military officers subject to the Military Leave Rules.]

Chapter XII.—Short Leave.

SECTION I.—EXTENT OF APPLICATION.

241. The rules in this Chapter regulate the Short Leave of all officers in Civil employ (whatever may be the rules to which they are subject in regard to other leave) except :—

- (a) The Governor-General, Governors, Lieutenant-Governors, and Members of Council (see Chapter XXII).
- (b) Judges of High Courts (see Chapter XXIII).
- (c) Barristers holding the appointments referred to in Chapter XXIV except as stated in that Chapter.
- (d) Ecclesiastical officers appointed before 29th July 1906. But Articles 264, 279 and 280 do apply (see Chapter XXVII).
- (e) Law officers, except as stated in Chapter XXXI.
- (f) State Railway Establishments, except as stated in Chapter XXXII.
- (g) Bengal Covenanted Pilots, except as stated in Chapter XXXIII.
- (h) Port Blair Police (see Chapter XXXIV)
- (i) Calcutta and Suburban Police Forces (see Chapter XXXVI).

1. Medical Storekeepers to Government are subject to these Regulations as regards Privilege leave, but as regards other leave they remain subject to the Leave Rules, Military or Civil, under which they were serving at the time of their transfer to the Medical Store Department

Temporary and Non-Continuous Service.

242. (a) An officer who has may be allowed Privilege leave, if no substitute is required, or if tional expense.

(b) If such an officer is, without interruption of his service, appointed to a permanent office, his temporary or officiating service may be treated as duty qualifying for Privilege leave.

NOTE.—[This rule does not apply to the State Railway officers whose service is classed under clauses (c) and (d) of Article 659.]

243. Privilege leave is not allowed to an officer employed in an establishment the duties of which are not continuous, but are restricted to certain fixed periods in each year. (*See also Article 369.*)

Petty Military Officers.

244. Privilege leave may be granted under this Chapter to a Military Hospital Assistant temporarily lent to the Civil Department. A Hospital Assistant is not entitled to Privilege leave in respect of duty done in the Military Department

Seamen.

245. An officer or seaman attached to a Pilot vessel at the Sandheads may, in addition to the Privilege leave admissible under this Chapter, be allowed one month's leave on shore, beginning on the date of his arrival at Calcutta, after four months' continuous duty at the Sandheads.

SECTION II.—PRIVILEGE LEAVE—ORDINARY RULES.

Amount earned

246 The amount of Privilege leave earned by an officer is one-eleventh part of the time during which he has been on duty without interruption: Provided that no Privilege leave can be earned by an officer by duty performed while three months' such leave is due to him, and that, whenever duty is interrupted, all claim to Privilege leave earned theretofore is forfeited. Absence on Privilege leave, though not counting as duty, is not an interruption of duty within the meaning of this Article.

247. The calculation must be made as follows:—One calendar month for every eleven complete calendar months of duty, and one day for every eleven days of the balance.

Qualifying Service.

248. When an officer is first appointed to the public service, duty qualifying for Privilege leave does not begin until he takes charge of his office.

249. Time spent on Subsidiary leave does not qualify for Privilege leave, but if an officer, returning from leave, not before the expiration thereof, be, only for the convenience of the Local Government and not for any fault of his

ment ready for duty.

250. (a) In calculating the Privilege leave of a Military officer no distinction should be made between an officer who has a substantive Civil appointment and one who is merely officiating in the Civil Department.

(b) The leave is earned by uninterrupted duty in either the Civil or the Military Department. But a Military officer who has taken in any calendar year the whole or a portion of the Privilege leave admissible to him for that year, under Military Rules, does not begin to count service for Privilege leave in the Civil Department until the first day of the following year.

Limit.

251. The amount of Privilege leave admissible at one time is limited to three calendar months.

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Amount due.

252. The Privilege leave due to an officer is the privilege leave which he has earned since the last interruption of duty, less the period during which he has been absent on Privilege leave.

Interruptions of Duty.

253. If an officer remains absent after the end of Privilege leave, his duty is interrupted within the meaning of Articles 246 and 260. But if the Local Government considers that his default was due to circumstances beyond his control, it may remit the penalty.

NOTE.—[The Local Government may delegate its power under this Article to any subordinate authority in respect of officers to whom such authority is empowered to grant leave.]

254. If an officer remains absent after the end of Examination leave, or of Joining Time, the period of absence cannot count as duty qualifying for Privilege leave, and, unless the absence is accounted for to the satisfaction of the Local Government, it is an interruption of duty.

NOTE.—[The Local Government may delegate its power under this Article to any subordinate authority in respect of officers to whom such authority is empowered to grant leave.]

255. (a) Leave under Articles 279 and 280 may, if the examination for which it is granted be successfully passed, and if the officer has not already had twelve months' leave under that Article, count as duty qualifying for Privilege leave.

(b) Leave under Article 281 may also count as duty qualifying for Privilege leave if the examination for which it is granted is successfully passed.

(c) Examination leave does not interrupt duty.

256. Hospital leave under Articles 287, 288, 288 A and 291 and leave on medical certificate under Articles 661 and 663 are not interruptions of duty.

257. Suspension from office as a penalty for misconduct is an interruption of duty.

258. Suspension from office pending enquiry into an officer's conduct interrupts duty or not as may be decided in each case by the authority having power to pass final orders in the case. Time passed under suspension does not qualify for Privilege leave, unless, in any case, such authority expressly orders that it shall so qualify.

259. "Leave in India" under Rule 1 of the Leave Rules for the Indian Army is an interruption of duty.

Condition of Grant.

260. To an officer who has been on duty, without interruption, for eleven calendar months, and who has not, for six calendar months, been absent on Privilege leave, the whole or any part of the Privilege leave due to him may be granted. But when Privilege leave is combined with other leave under Article 233, the amount due may be granted irrespective of these conditions.

1 The condition prescribed in this Article by which an interval of six months is required to elapse between two periods of absence on privilege leave, does not apply to officers of the State Railway Revenue Establishment referred to in Articles 661 and 663, nor to Gazetted Officers of the Opium Department.

2 The Government of India may relax the condition in this Article requiring an interval of six months to elapse between two periods of privilege leave, in cases in which its enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State.

Leave Allowances.

261. Except as provided in Articles 266, 271, and 275, an officer on Privilege leave is entitled to a leave allowance equal to the salary which he would receive if he were on duty in the appointment on which he has a lien, and he is entitled to this allowance even though another officer be appointed to act for him.

262. *Cancelled*

263. An officer who has no lien on an appointment is entitled, during Privilege leave,—

(i) in the case of a member of the Indian Civil Service or a Military officer subject to the Civil Leave Rules—to Subsistence allowance ;

(ii) in the case of any other Civil officer—to no allowance

Exception—Officers of the Indian Medical Service who have rendered not less than 3 years' officiating service but have not yet been confirmed in a civil appointment may draw, during privilege leave, when they have no lien on any appointment, the allowances that would be admissible under the military leave rules

264. Save when privilege leave or vacation is combined under the rules with other leave; the right to receive allowances admissible during privilege leave or vacation is contingent (except in case of death) upon the return of an officer to duty on the expiry of such leave or vacation.

Note—The right to draw allowances during privilege leave is contingent upon the officer's return to duty on the expiry of such leave or vacation.

265. If an officer, on transfer from one appointment to another, obtains Privilege leave without joining his new office, his leave allowance shall not be less than it would have been if he had joined his new office before taking leave, provided that the rate of pay attached to the new appointment is not different from and higher than the rate of pay attached to the old appointment. Where, however, the transfer involves an increase in the officer's duties or responsibilities, and is to an office on a different and higher rate of pay from that drawn by the officer in the old office, the officer shall not draw the higher rate of salary until he actually joins his new office.

Example—The rate of pay drawn by a Collector and by an Accountant General is different from and higher than the rate of pay drawn by a Joint Magistrate or by an officer in class I of the Indian Finance Department respectively.

266. An officer who holds an appointment sanctioned for not more than six months is not entitled, during Privilege leave, to the special rate of pay of, or any special allowance attached to, the appointment.

Local Allowances how affected.

267. A Local Allowance may be drawn by an officer on Privilege leave only if there is no *locum tenens* to whom it is payable.

1. An officer on Privilege leave may draw Presidency allowance or Presidency house-rent, provided that no extra expense is thereby caused to the State and provided his previous rate of expenditure for a house is continued during his absence

Note—The rate of expenditure for a house is to be ascertained on the basis of the actual expenditure during the previous year.

Irrigation Departments are manned from a single cadre, may be regarded as one Province.]

3. Provincial Forest Officers and Executive Engineers serving in the Andamans who are recruited from Burma draw their local allowances while on Privilege leave.

House-rent, Horse Allowances, Tentage, etc.

268. In the Bombay Presidency, an officer on Privilege leave may draw the house-rent attached to his appointment, if he places his house at the disposal of the officer, if any, who officiates for him. The officiating officer cannot, in such case, draw the house-rent attached to the appointment. But if the officer, for a reason which the Local Government considers sufficient, refuses the accommodation placed at his disposal, the allowance is to be drawn by him and not by the absentee.

1. Constables of the Bombay City Police and policemen in the Bombay Presidency proper while on leave under Article 268 may draw the house-rent allowance admissible to them, provided it is not paid to their substitutes.

269. A Military Medical Subordinate employed in the Civil Department may, when on Privilege leave, draw the special allowances of his appointment such as house-rent, horse allowance, etc., provided that they are not drawn by any other officer during his absence.

270. *Cancelled.*

SECTION III.—PRIVILEGE LEAVE IN CASES OF REGULAR VACATIONS.

271. Privilege leave is not admissible to officers serving in departments in which regular vacations are allowed, during which the officers are permitted to be absent from duty, as Judicial Officers (other than District and Sessions Judges), Educational Officers, Officers in a High Court. But in case of urgent necessity, Privilege leave may be granted to any such officer under the ordinary rules, subject to the conditions—

- (i) that the officer shall during his absence receive only half the salary and allowances ordinarily admissible during Privilege leave, and
- (ii) that the leave cannot in any case be combined with vacation.

NOTE.—[The rule in this Article does not apply to the Judicial Commissioners and Additional Judicial Commissioners of Oudh, Sind, and the Central Provinces in cases where the conditions of the note to Article 278 are satisfied.]

272. The preceding Article does not apply to the case of an officer who is by general or special orders issued by competent authority prevented in any year from availing himself of the vacation or vacations by reason of his having to remain at his post on duty. In such a case, Privilege leave may be granted under the ordinary rules: Provided always that the leave shall not in any case be combined with vacation.

NOTE.—[In the case of every officer to whom Articles 271 and 272 apply, the presumption is that he will avail himself of the vacation. No certificate of title to Privilege leave, except the leave "in case of urgent necessity" under Article 271, can be given for the period

of service rendered between two vacations until the second vacation begins. If the condition of service rendered between two vacations until the second vacation begins is such that the privilege leave is not admissible (Article 271), may combine vacation with Long Leave (either at the beginning or end thereof) on the same conditions as those on which other officers are allowed to combine Privilege leave under Article 233.

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(i) that he was not absent from his station for more than fifteen days or

(ii) that he was absent from his station for a specified number of days exceeding fifteen,

in any of the vacations included in the period of service by which the Privilege leave claimed has been earned.

NOTE.—[Absence on duty, whether within or out of jurisdiction, is not absence from station for the purposes of this Article.]

274. An officer who is, by general or special orders issued by competent authority, reported from availing himself of a rest only of a period of

275. An officer transferred from a department to which the ordinary Privilege leave rules apply to one in which Articles 271 to 274 apply, loses all claim to take the Privilege leave at his credit, provided that—

(i) Any

(ii) If he returns to a department in which Privilege leave is regulated by the ordinary rules, he shall be reckoned on such return to have at his credit the amount of leave which was at his credit at the time of the first transfer, less any amount enjoyed under proviso (i).

276 The reckoning under the preceding Article shall not, in any case, extend backwards over an interruption of duty.

277. Officers to whom Privilege leave under the ordinary rules and conditions is not admissible (Article 271), may combine vacation with Long Leave (either at the beginning or end thereof) on the same conditions as those on which other officers are allowed to combine Privilege leave under Article 233.

278. The foregoing rules do not apply to District and Sessions Judges : to them privilege leave is granted under the ordinary rules, and they may combine—

(a) Privilege leave with long leave under the conditions of Article 233

(b) Vacation on full pay with leave of any kind provided that—

(i) No additional expense is incurred by the State for the period of the vacation.

(ii) Vacation is not both affixed and suffixed to leave.

(iii) The total period of absence on full pay, when vacation is taken in conjunction with combined leave, does not exceed three months.

NOTE 1.—[The rule in this Article has been extended to the Judicial Commissioners, and Additional Judicial Commissioners of Oudh, Sindh and the Central Provinces, for such time as the Court of the Judicial Commissioners in each case consists of not less than three Judges and provided the Court's annual vacation does not exceed one month.]

NOTE 2.—[The provisions of this Article also apply to Sessions and Subordinate Judges in the United Provinces.]

SECTION IV.—EXAMINATION LEAVE

279. In cases not specially provided for in this Section, permission to the day or days of examination.

280. (a) A candidate for the High Proficiency and Degree of Honour examinations in all vernacular languages may, at the discretion of the Local Government, be granted study leave up to three months before the examination.

(b) A candidate for a reward by the Higher Standard or High Proficiency in Sanskrit, Arabic or Persian may be allowed leave for a period not exceeding three months if he undertakes to spend it in study under professional tuition at any place approved by the Local Government.

(c) An officer who is a candidate for the Degree of Honour in Sanskrit, Arabic or Persian may be allowed either leave for a period not exceeding three months under clause (b), or if he leaves India for study, leave for six months to Persia for Persian, or for six months to Arabia, Mesopotamia, Egypt and Syria for Arabic, or for six months to any place approved by the Local Government for Sanskrit. Officers of the Political Department of the Government of India may be granted this leave even when they are candidates only for the Higher Standard or High Proficiency test in Arabic or Persian.

NOTE.—[Leave under clause (a), (b) or (c) is not admissible more than once; nor can such leave be combined.]

(d) Leave under this Article may be combined with Privilege leave, provided that Privilege leave prefixed to leave under clause (c) must be spent in, or in travelling to, one of the countries mentioned in the clause.

(e) An officer on leave under this Article has a lien on his appointment, substantive or officiating, and is entitled to leave allowances, as if he were on Privilege leave, for an aggregate maximum period of twelve months.

NOTE—[An officer serving in a department in which regular vacations are allowed is entitled, during examination leave, to a leave allowance equal to the salary which he would receive if he were on duty in the appointment on which he has a lien.]

281. An officer of the Burma Commission, who has passed an elementary examination in Chinese, and is a candidate for the reward of Rs. 2,000, may, on condition that the leave must be spent in China, be granted leave, on Privilege leave allowances, to China for fifteen months, for the purpose of studying the Chinese language. This leave may be affixed or prefixed to (1) Privilege leave, (2) Furlough or (3) Privilege leave and Furlough combined under Article 233, provided that in the case of (2) and (3) the whole period of absence shall not exceed two years, exclusive of Subsidiary leave. But Privilege leave cannot be allowed in continuation if the officer fails to pass the examination.

Such leave can be granted only once to any officer.

NOTE—[Leave granted under Articles 280 and 281, covers the whole period of absence from regular duty, including the day or days of examination and the time spent in proceeding to and from the place of examination. The leave cannot be taken in instalments.]

282. Except as provided in Articles 280 and 281, no kind of leave, except Furlough on medical certificate, may be granted in continuation of Examination leave.

283. The rules in this Section apply to Military officers subject to the Military Leave Rules serving in any Civil Department—other than the Public Works, Railway, the Survey of India and Forest Departments, to which Departments they are not applicable.

Departmental Examinations.

284. (a) An officer while absent from his office or from his station to attend an obligatory Departmental Examination, or (in the Punjab) an examination in Pushtu or Baluchi, is considered to be on duty.

(b) Leave may not be given under this Article to an officer to prepare for examination, or for recreation after examination. A reasonable time, including the day or days of examination, should be allowed for the journey to and from the place of examination, and nothing more.

285. An officer permitted to present himself at any examination which must be passed before a person is eligible for a higher subordinate appointment in any branch of the service, such as a Deputy Magistracy, may, under the orders of his immediate departmental superior, be allowed leave of absence for the number of days actually necessary to enable him to attend at the examination. During this short absence, no deduction will be made from the officer's allowances, unless the head of the office finds such deduction necessary to enable him to make arrangements for carrying on the work. Such leave should not be allowed more than twice for each standard of examination.

286. Leave may not be granted under this Section to a Military officer subject to the Military Leave Rules to enable him to pass an examination under Article 681, Army Regulations, India, Volume I, Part I.

SECTION V.—HOSPITAL LEAVE.

Jail Warders, Postal Officers ; Peons and Guards.

287. A Warder of a Lunatic Asylum (except in Central Provinces and other provinces where the Local Government has extended the concession of Article 288 to this class of officers), Postman, Mail Carrier or Mail Coachman, or a Peon or a Guard in permanent employ whose case is not provided for in Article 288, while ill in hospital or dispensary, or receiving medical aid as an out-door patient of the hospital or dispensary of the station at which he serves, may, without reference to the allowance paid to his substitute, be allowed half pay for a period not exceeding six months altogether in any one term of three years, whether such leave be taken in one period or by instalments. The Director-General of Posts and Telegraphs and Postmasters General may grant full pay for three months to a Postman, Mail Carrier or Mail Coachman in exceptional circumstances, as, for example, if he is wounded by robbers or a wild animal, and may also, at his discretion, dispense with the condition requiring attendance at a hospital or dispensary. The Director-General may also grant leave on full pay in India for a period not exceeding six months to subordinates of the Railway Mail Service who may be injured in the execution of their duty, subject to the conditions under which such leave is granted to State Railway employes by the Managers of State Railways under Article 665.

NOTE.—[The term "Peon" in this Article includes a process-server of that class.]

Police and Salt Department Officers.

288. A police officer enrolled under any Act of the Legislature (not being a member of the Port Blair Police Force), whose pay does not exceed Rs. 20, or if he be a member of the Bombay City Police Force, Rs. 25, or an officer of the Northern India Salt Revenue Department, or of the Madras Salt and Abkari Department, or of the Customs Department in the out-ports and land customs stations in the Madras Presidency, or of the Bengal Excise and Salt Department, or of the Bihar and Orissa Excise and Salt Department, or the Bombay Salt and Abkari Departments (including officers of the Opium Preventive Service) whose pay does not exceed Rs. 20, or a Head Warder, a Warder or an orderly belonging to the Jail Department in Bengal or Bihar and Orissa or a Head Warder or Warder of the Jail Department in any other province whose pay does not exceed Rs. 20 a month, or a Head Warder or Warder of a Lunatic Asylum whose pay does not exceed Rs. 20 in the Central Provinces or in any other province where the Local Government extends the concession of this Article to this class of officers, or a Matron of the Jail Department whose pay does not exceed Rs. 20 a month, may, while sick in hospital or while

receiving medical aid as an out-door patient at the station or head-quarters of the district in which he serves, be allowed, at the discretion of the sanctioning authority, leave of absence from duty for six months altogether in any period of three years. Such leave may be taken in one period or by instalments and may be followed by or taken in continuation of, any other leave admissible under these Regulations. For the first three months of such leave the officer may receive full pay, and for the remaining three months half pay, without the restriction that no extra cost shall be imposed upon the State: Provided always that this concession shall be confined strictly to cases in which illness shall be certified not to have been caused by irregular or intemperate habits.

NOTE 1.—[A Police officer on leave under this Article may for the first three months of such leave, during which full pay is admissible, retain any local allowance attached to his appointment: Provided there is no *locum tenens* to whom it is payable.]

NOTE 2.—[Constables of the Bombay City Police while on leave under this Article may draw the house-rent allowance admissible to them, provided it is not paid to their substitutes.]

NOTE 3.—[This Article so far as it applies to Head Warders or Warders of the Jail Department includes both female and male Warders.]

School Mistresses.

288A. Maternity leave of absence from duty may be granted on full pay by a Local Government or any subordinate authority empowered in this behalf whether by general or special order by a Local Government to school mistresses for a period which shall not ordinarily exceed two months, but which may be extended to 3 months at the discretion of the sanctioning authority.

Marine and Military Establishments.

289. An Officer, Warrant or Petty officer, of the Indian Government, sea-going, inland, or harbour vessels and hulks, is, in case of sickness or injury, ordinarily treated on board his vessel, and is entitled to full pay for a period not exceeding six weeks. If sent to a hospital, such an officer is, unless the disease or injury is certified by a responsible Medical Officer to have been caused by an offence such as malingering, wilful maiming, wilful aggravating of disease or injury, drunkenness, etc., committed by him, entitled to full pay for a period of six weeks, inclusive of any time passed on board his ship sick-quarters. Time thus spent in ship sick-quarters or in hospital on shore, up to a period of six weeks, is not an interruption of duty within the meaning of Articles 246 and 260. An officer of the Marine Department who holds a shore appointment is not entitled to this concession.

NOTE.—[The provisions of this Article apply to the crew of the Indo-European Telegraph Department Steamer.]

290. A seaman disabled while in the discharge of duty may be allowed pay at harbour rates for a period not exceeding three months, provided that the injuries from which he is disabled are certified to by a Government Medical Officer; and are not owing to the seaman's own carelessness or inexperience, and that the vacancy caused by his absence is not filled up.

291. An Engineer of the Marine Department, an employé in a Government Press, a subordinate employé (including a temporary or extra employé)

in an Ordnance or Government Dockyard establishment, a syce whether permanent or temporary in charge of a Government stallion, or a public servant in a Commissariat establishment may, during absence from work on account of injuries received in the course of his duty, be allowed full pay for one month, and thereafter half pay for three months.

292. A Dockyard artificer on the permanent establishment may, in case of ordinary sickness, be allowed full pay for a week, if his work can be carried on without a substitute and without inconvenience, but no pay can be allowed to him—

- (i) if it be necessary to appoint a substitute; or
- (ii) if his absence be prolonged beyond a week, whether it be necessary to appoint a substitute or not.

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hs altogether in any period or by instalments, during their allowance paid to their

the person concerned

for a disease not the result of impru-

ties, Bearers, Cooks, Cook's mate, Cook's assist-

the Presidency Town of Madras; and Ward attendants (including dispensary servants, and dressers), Cooks, Sweepers, Bhutias, Dhobis, in the Bombay Presidency.

Presidency Public Works Workshops, Madras.

294. Labourers in the Presidency Public Works Workshops, Madras, the Government Public Works Workshops at Dowlaishwaram and Bezwada, the Public Works Stores at Madras and in the Pumping Station at Divi, employed on daily wages, when temporarily absent from work in consequence of injuries sustained on duty, may, on production of a medical certificate, signed by a properly qualified officer of Government, recommending their
superintendent
Article 660

SECTION VI.—DEPARTMENTAL LEAVE.

295. Departmental leave may be granted during the Recess by the Head of the party or Office to which he belongs to—

- (1) a Native Surveyor or other subordinate in the Survey of India, or in the traverse Survey Party of the Central Provinces, whose service is superior,—on half pay or less (payable on return to duty), or without pay;

- (n) such of the Tindals, Mates, Khalasis, Jamadars, Chaprasis, Burkandazes attached to any Party or Office of the Survey of India or to the traverse Survey Party in the Central Provinces, as the Head of the Party or Office may deem it desirable to re-entertain for the ensuing season,—on allowances not exceeding half pay (payable on return to duty).

Provided always that the officer returns to duty when required by his superior officers.

- 1 Superintendents in charge of survey circles and the Superintendent of the Trigonometry.

an extension of the departmental leave is asked for on a medical certificate, the entire absence should be converted into leave under Article 336.

2. This Article does not apply to the establishments attached to the Head Quarters Offices, Calcutta and Dehra Dun.

3 The establishments of the Bengal and Bihar and Orissa Survey Departments employed purely on field work may be granted leave under this Article on the same conditions as similar officers of the Survey of India.

296. Privilege leave may not be granted to an officer who is entitled to departmental leave under the preceding Article, but a Lower Subordinate in the Survey of India, or in the Traverse Survey Party of the Central Provinces, a menial in the Survey of India, or a Lower Subordinate or menial in the Bengal and Bihar and Orissa Survey Departments employed purely on field work, who is prevented from availing himself of departmental leave, may be allowed to take Privilege leave under the ordinary rules, service towards such leave counting from the date of return from departmental leave. Privilege leave will not be granted except upon a certificate, from the Head of the Party or Office to which the officer is attached, that he was prevented from availing himself of departmental leave in consequence of the exigencies of the service.

Chapter XIII.—Long Leave—European Services.

SECTION 1.—EXTENT OF APPLICATION.

297 The rules in this Chapter apply to—

(a) Members of the Indian Civil Service.

(b) Military officers subject to the Civil Leave Rules.

(c) The officers enumerated in Appendix II of the 2nd edition of these Regulations, and also all officers belonging to the classes enumerated in Article 330 (c) of that edition and appointed thereto by the Secretary of State or with his particular sanction.

(d) Members of the Imperial Branch of the General (Executive and Judicial) Administration; the Education Department; the Forest Department; and the Survey Department.

(c) Officers substantively holding any of the appointments enumerated below :—

JUDICIAL DEPARTMENT.—
 (2) Registrar in Equity, Admiralty and Admiralty Registrar, Original Side, Barristers or Solicitors.

POLICE DEPARTMENT.—Assistant Superintendents and officers of higher rank.

JAIL DEPARTMENT.—Inspectors General and Superintendents of Central and Presidency Jails.

EDUCATION DEPARTMENT.—Principals of the following institutions.—Lawrence Military Asylum, Sanawar; Mayo College, Ajmer; Residency College, Indore; Government College, Ajmere; Rajkumar College, Rajkot.

BERRA COMMISSION.—Assistant Commissioners and officers of higher rank appointed by the Secretary of State, or with his particular sanction.

PORT BLAIR COMMISSION.—Assistant Superintendents and officers of higher rank.

ACCOUNTS DEPARTMENT (CIVIL).—

(a) Officers of the Indian Finance Department, including members both of the late Enrolled List and of the late Superior Accounts Branch of the Public Works Department :—

(i) if appointed in England by the Secretary of State ;

(ii) if appointed otherwise, but drawing pay not less than Rs. 800 a month.

(b) Officers of the late Postal Accounts Department drawing pay not less than Rs. 80 a month.

MILITARY ACCOUNTS DEPARTMENT.—Officers appointed in England by the Secretary of State.

POSTAL DEPARTMENT.—Officers of higher rank than Superintendent.

OPIMUM DEPARTMENT.—Sub-Deputy Opium Agents and officers of higher rank.

SALT DEPARTMENT.—Assistant Commissioners and Assistant Collectors and officers of higher rank.

MINOR SCIENTIFIC DEPARTMENTS.—Civil officers of the Civil Veterinary Department and all other officers originally appointed to the public service by the Secretary of State or with his special sanction.

ARCHAEOLOGICAL DEPARTMENT.—Director-General, Epigraphist, and Superintendents of circles.

IMPERIAL CUSTOMS DEPARTMENT.—

(1) Officers appointed in England by the Secretary of State.

(2) Other officers on pay of not less than Rs. 900 a month.

PUBLIC WORKS AND RAILWAY DEPARTMENTS. *General*.—Officers of the Engineer Establishment, the Superior Accounts Branch, and the Superior Revenue Establishment of State Railways, appointed thereto by the Secretary of State or with his particular sanction.

ENGINEER ESTABLISHMENT.—Engineer officers, of whatever rank in the Department, who belong to the Imperial Branch of the establishment, except those who were appointed in India as Natives of India.

Superior Revenue Establishment of State Railways.—Officers whose pay is not less than Rs. 800 a month.

Government of India, Public Works Department, Secretariat.—Under Secretary, being a member of a graded establishment.

- INDIAN TELEGRAPH DEPARTMENT.**—The Imperial Branch of the Department.
- INDO-EUROPEAN TELEGRAPH DEPARTMENT.**—Officers of the graded establishment of Directors; Electrician; Superintendents and Assistant Superintendents. Medical officers, if appointed by the Secretary of State. The Commander, First and Second Officers, and Chief Engineer of the Cable Ship.
- MARINE DEPARTMENT.**—Constructors, Bombay and Kidderpore Dockyards.
- MEDICAL DEPARTMENT.**—Matron, Assistant Matron and the Nursing Sisters of the General Hospital, Rangoon, when recruited in England.
- PRINTING DEPARTMENT.**—Superintendents of Government Printing, India, Madras, Bombay, Bengal, United Provinces and Burma on pay not less than Rs. 800 a month.
- OTHER OFFICERS.**—The First Engineer and Shipwright Surveyor to the Government of Bengal; the Agent for Government Consignments, Calcutta; and the Superintendent of the Government Museum and Principal Librarian of the Connemara Public Library, Madras.

(f) Officers specially admitted by the Government of India to the benefit of the rules in this Chapter.

298. An officer to whom the rules in this Chapter are applicable does not forfeit his privileges upon transfer to some office not included in Article 297, unless such transfer is ordered as a penalty, or because of the officer's inefficiency.

SECTION II.—FURLOUGH.

General Limitation.

299. The amount of Furlough admissible to a member of the Indian Civil Service or a Military officer subject to the Civil Leave Rules and the

300. The following leave under other rules is counted as Furlough under the preceding Article:—

(a) In the case of a Military Officer subject to the Civil Leave Rules:—

- (1) Furlough under Rules 1 and II of the Military Furlough and Leave Rules of 1875; and
- (2) Leave in or out of India with pay under the Leave Rules of 1886 for the Indian Army.

(b) In the case of any other officer to whom these rules apply,—Furlough and leave with allowances on medical certificate, and Leave on Private Affairs under the Indian Service Leave Rules.

Leave after completion of term of Service.

301. (a) The limitations affecting members of the Indian Civil Service whose term of service is complete, are prescribed in Article 555, and those affecting Military Officers, in Article 620.

(b) Any other officer subject to the rules of this Chapter who is retained in the service after the age of fifty-five years may, after attaining that age, be granted Privilege leave or any Special leave to which he may be otherwise entitled or Subsidiary Leave preparatory to retirement, or Extraordinary leave without allowances under Article 332. The total leave granted, under the heads of Special or Extraordinary, must not exceed six months in all. No other kind of leave may be granted, and any leave, other than Privilege leave or Special leave or Subsidiary Leave preparatory to retirement, granted to such an officer before the date on which he attains the age of fifty-five years, ceases to have effect on that date.

• Furlough earned.

302. The amount of Furlough "earned" by an officer is one-fourth of his Active Service. (*See also Article 305.*)

¹ NOTE.—[In the case of a Military officer subject to the Civil Leave Rules this Article has effect only from the date on which he becomes subject to those rules (see rules 1 and 2 under Article 35), furlough in respect of previous service being credited under Article 303.]

303. A Military officer subject to Civil Rules may, if he desire it, add to Furlough earned by service under Civil rules an amount of Furlough in respect of his previous service calculated as shown below. If, however, the result of such calculation is that the officer had, at the time of coming under Civil rules, taken leave in excess of the proportion applicable to his previous service, such excess shall not be taken in reduction of the Furlough earned by him under Civil rules. A Military officer subject to Civil rules may be granted at any time any leave which he has earned under Civil rules and may defer or forego the leave he has earned under Military Regulations.

- (i) An officer who, at the time of coming under Civil Leave Rules, was subject to the Military Furlough Regulations of 1868 or 1875, may be credited with the Furlough that may have accrued to him, less any Furlough already taken which, under those rules, would reduce the amount of Furlough due. The amount of Furlough accrued shall, in that case, be calculated proportionably on the whole service qualifying for Furlough without reference (a) to the restriction imposed by those rules on the counting towards Furlough of any Military Service in India rendered by the Officer previous to his becoming subject to such rules, and (b) to the minimum periods of service which those rules require to be rendered before Furlough can be granted.
- (ii) The service for Furlough of an officer whose case does not fall under clause (iii) of this Article, and who, when he came under the Civil Leave Rules, was subject to the Indian Army Leave Rules (1886), shall be calculated in accordance with Article 302 retrospectively from the date of his arrival in India, i.e., he shall be

Despatch No. 188 of September 21, 1893, by reason of his acquiring on or after that date the qualification specified in Article 297 (d) or (e) :—

- (i) The amount of Furlough due to him shall be taken at one-eighth of his active service while under the Indian Service Leave Rules, less the amount of Furlough or of Leave on Private Affairs enjoyed by him under Articles 337 and 338.
- (ii) Leave on Medical Certificate shall in this calculation reckon neither as service qualifying for Furlough nor as Furlough taken, but the amount of Furlough due shall not exceed the amount which would be due if the officer had been under the European Service Leave Rules from the beginning of his service and the leave taken by him on medical certificate had been Furlough on medical certificate under the rules in this Chapter.

(b) In the case of an officer who is brought under the rules in this Chapter for the first time, by the operation of the orders in the despatch of the 21st September 1893, but who would have come under them at an earlier date if they had been in force at the time, the calculation of Furlough and other leave due shall be made as follows :—

- (i) If under those orders he would have been under the rules in this Chapter from the commencement of his service, the calculation shall be made as if such rules had applied to him from the commencement of his service, and all leave taken by him had been taken under those rules
- (ii) If under those orders he would at some stage in his service have passed from the Indian Service Leave Rules to the rules in this Chapter, then the calculation shall be made under the rules in clause (a) under this Article, as if he had come under the rules in this Chapter at such earlier stage. He shall be held to have been under the rules in this Chapter from the said earlier date, and all Furlough, Leave on Private Affairs, or Leave on Medical Certificate taken after such date shall be treated as Furlough taken under the rules in this Chapter.

Provided that in the case of the officers mentioned in Article 297 (c) who came under the rules in this Chapter before the 11th October 1893, the calculation shall continue to be made under the following rules :—

In calculating the Furlough "earned" only half the Active Service rendered by the officer in offices other than those included in Article 330 of the Second Edition of these Regulations is taken into account. The whole of the Active service rendered by the officer whilst officiating in any of those offices is taken into account

In calculating the Furlough "due" the Furlough "earned" is diminished by the Furlough, Leave on Private Affairs and Leave on Medical Certificate with allowances, which the officer has enjoyed under the Indian Service Leave Rules

306. The rules in Articles 304 (b) and 305 are subject to the proviso that if more than two years' Furlough be due to an officer when he first becomes subject to the rules in this Chapter, the excess shall be cancelled.

307. An officer who comes under the rules in this Chapter, while he is on leave under the Indian Service Leave Rules, may at his option—

- (a) change his leave allowances to the amount admissible under the European Service Leave Rules and come under them immediately ; or
- (b) postpone his coming under them until his return from leave.

Furlough admissible.

308. To an officer who has rendered three years' Continuous Service, Furlough for not more than two years may be granted as follows :—

- (a) On medical certificate :—unconditionally ; see Articles 828 to 832 ;
- (b) without medical certificate :—subject to these provisos :—

- (i) that the Furlough be due to him ;
- (ii) that he has rendered eight years' Active Service in Civil employ ;
- (iii) that an interval of not less than eighteen months has elapsed between last return from Privilege leave of over six weeks' duration, and the furlough, or privilege leave, if any, with which the furlough is combined. In the case of Privilege leave combined with other leave which does not interrupt Continuous Service (Article 22), the period of 18 months begins to run from the date subsequent to that of the end of the combined leave ;
- (iv) if a Military Officer subject to the Civil Leave Rules, who has not rendered eight years' Active Service in Civil employ, and
 - (1) if the Furlough which he applies for is his first Furlough—that he has two years' Furlough due to him under the calculation in Article 303 ; or
 - (2) if the Furlough applied for be other than his first Furlough—that he has rendered three years' Continuous Service since his return from Furlough ;

- (v) that

NOTE.—[The Government of India may relax the following conditions governing the grant of furlough under this Article, in cases in which their enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State :—

- (1) three years' continuous service in civil employ ;
- (2) eight years' active service in civil employ ;
- (3) an interval of eighteen months since last return from privilege leave of over six weeks' duration ;
- (4) three years' continuous service since his return from furlough in the case of a military officer subject to civil leave rules, who has not rendered eight years' active service in civil employ and who applies for furlough after he has availed of it once in such employ]

309. Except on medical certificate or on very urgent private affairs, Furlough or Special leave may not be granted to any member of the Indian

Civil Service, or to any Military officer whether subject to the Civil or Military Leave Rules, or to any other officer who is, if employed in Oudh, the Central Provinces, Burma, Assam, Ajmer, Coorg or Berar, a member of the Commission, or who is, if employed elsewhere, the holder of an office corresponding to that of a member of a Commission, if one-fifth of all the officers of a Commission or of all officers holding appointments similar to those of members of a Commission, as the case may be, are already absent on Furlough or Special leave, or study leave in the case of officers of the Indian Medical Service.

310. (a) If, under the operation of proviso (v), Article 308, the applications for Furlough (including those under Article 232) cannot all be complied with, Furlough will be granted in the following order :—

First—To the applicant to whom the most Furlough is due :

Secondly—Of two or more applicants to whom the same amount is due ;
to him who has rendered longest Continuous Active Service :

Thirdly—Of two or more such applicants who have rendered the same Continuous Active Service—to the Senior.

(b) The following positions are vacant unless they happen to arrive by the same post.

311. To an officer who has not rendered three years' Continuous Service, Furlough may be granted on medical certificate as follows —

(a) if the Furlough due exceeds a year—to the extent due, not exceeding two years.

(b) if the furlough due does not exceed a year—for not more than one year.

Extension of Furlough.

312. (a) Furlough granted under Article 308 may, on medical certificate, be extended to not more than three years

(b) Furlough granted under Article 311 for less than two years under clause (a), or less than one year under clause (b), may, on medical certificate, be extended to the extent of the Furlough due to the officer, not exceeding two years, or to one year, respectively.

Ordinary Furlough.

313. Ordinary Furlough can, under no circumstances, extend beyond two years at one time: it includes—

(i) the first two years of each separate period of Furlough under Article 308, including any extension under Article 312 (a);

(ii) so much of Furlough under Article 311, including any extension under Article 312 (b), as may be due.

Leave Allowances.

314. An officer on ordinary Furlough is entitled to a leave allowance equal to half his average salary, subject to the following limits :—

(a) In the case of a member of the Indian Civil Service—

- (i) if paid¹ at the Home Treasury of the Government of India, maximum £1,000 a year and minimum £500 a year, or the salary last drawn by him on duty, whichever is less ;
- (ii) if paid in India, maximum Rs. 833½ a month and minimum Rs. 416½ a month, or the salary last drawn by him on duty, whichever is less.

(b) In the case of a Military Officer, subject to the Civil Leave Rules, the same maxima and minima as in the case of a member of the Indian Civil Service: Provided that, during furlough added under Article 303 to the furlough earned under Civil Rules, the minimum shall (in the case of an officer who became subject to the Civil Leave Rules on or after the 1st April 1888) be that prescribed by the Military Rules to which an officer was subject immediately before coming under the Civil Leave Rules and that in the case of an officer of the Royal Engineers, whose case is governed by clause (ii) under Article 303, the minimum shall be the rate prescribed by the Leave Rules for the Indian Army, according to the length of his service for Indian pension. In the case, however, of an officer of the Royal Engineers serving under British Army Leave Rules, the minimum for so much of the furlough credited under Article 303 (ii) as has been earned by service in Civil employment shall be at the rate of—

for this concession.

(c) In the case of any other officer subject to these rules—

- (i) if paid at the Home Treasury of the Government of India, maximum £800 a year ; no minimum except as provided in Article 320 ;
- (ii) if paid in India, maximum Rs. 666½ a month ; no minimum, except as provided in Article 320 :

Provided always that the allowances of an officer during leave shall in no case exceed his actual salary when he takes leave.

¹ An officer on furlough does not forfeit his past leave allowances by resigning the Service without returning to India.

315. An officer on Furlough other than ordinary is entitled—

- (i) if a member of the Indian Civil Service or a Military officer subject to the Civil Leave Rules, to subsistence allowance [see Article 108 (a)] ;

- (ii) if an officer not in the Indian Civil Service or the Army, to £480 a year paid at the Home Treasury, or Rs. 400 a month paid in India or to one-quarter of his average salary, whichever is less. In the case provided for in Article 320, quarter average salary is subject to the minima prescribed in that Article.

Note.—If a shorter allowance is in respect of leave spent out of India, it is paid in India.

SECTION III.—SPECIAL LEAVE

316. Subject to the rule laid down in Article 232, special leave on urgent private affairs may be granted at any time for not more than six months

Provided that an officer who has had Special leave must render six years' Active Service before he can again have such leave.

1. Furlough under Rule XI of the Military Furlough Rules of 1868 is "Special leave" within the meaning of this proviso.

317. An officer promoted from an office, subject to the Indian Service Leave Rules, is not debarred from obtaining Special leave with allowances under the preceding Article by reason of his having had Leave on Private Affairs under the Indian Service Leave Rules which is furlough in another form.

Leave Allowances.

318. (a) For the first six months for which an officer is on Special leave, whether the six months be included in the same leave or not, he is entitled to the leave allowance admissible under Article 314. Thereafter, he is entitled to no leave allowance

(b) An officer on Special leave does not forfeit his past leave allowances by resigning the Service without returning to India.

319. A Military Officer in Civil employ, subject to the Furlough Rules of 1868, is entitled, during the first six months of Special leave under Article 316, to an allowance of half average salary, subject to a maximum of £1,000 and a minimum of £250 a year. The title to this allowance is not affected by any leave previously taken under Rule XI of the Rules of 1868

SECTION IV.—MINIMUM LEAVE ALLOWANCE.

320. The leave allowances of an officer of the classes referred to in Article 314 (c) if on leave out of India (except in Ceylon or the Straits Settlements) are subject to the following minima:—

- (a) if the leave is furlough on Medical Certificate under Article 308 (a) or Article 311, or

(b) if the leave, although not Furlough on Medical Certificate under Article 308 (a) or Article 311, has been granted on account of ill-health.

On ordinary Furlough or Special leave—

When paid in England	£200 a year, or $\frac{1}{12}$ ths of the salary last drawn on duty, whichever is less.
When paid in India	Rs. 166½ a month, or $\frac{1}{12}$ ths of the salary last drawn on duty, whichever is less.

On Furlough other than ordinary—

When paid in England	£100 a year, or $37\frac{1}{2}$ per cent. of the salary last drawn on duty, whichever is less.
When paid in India	Rs. 83½ a month, or $37\frac{1}{2}$ per cent. of the salary last drawn on duty, whichever is less.

SECTION V.—SUBSIDIARY LEAVE.

321. (a) Subsidiary Leave is the time allowed—

- (i) to an officer leaving India, on retiring from the service, or on Furlough or Special leave, to break up his domestic establishment and travel to the port of embarkation, and
- (ii) to an officer returning to India from Furlough or Special leave to travel from the port of debarkation and reorganise his domestic establishment.

No subsidiary leave is admissible to an officer who does not leave India by sea.

(b) Subsidiary leave granted to an officer preparatory to retirement ceases when he actually resigns the service.

1. An officer, serving in Persia or Turkish Arabia, reckons Subsidiary leave to or from the port or frontier town by which he leaves or returns to the country. The date of departure or return must be certified by the British Consul or, if there be no British Consul, by the officer himself.

2. An officer either of the Persian or the Persian Gulf Section of the Indo-European Telegraph Department, who practically has to go on or return from leave by an Indian port, whether it be Karachi or Bombay, may reckon Subsidiary leave to or from such port.

322. (a) The grant to an officer leaving India—

- (i) of permission to retire from the service, or
- (ii) of Furlough or Special leave out of India,

carries with it the grant of Subsidiary leave. But Subsidiary leave is admissible only at the end and not at the beginning of leave out of India when such leave is combined with Privilege leave under Article 233.

(b) An officer returning to India, without the permission of the authority which granted him leave, more than fourteen days before the end of his Furlough or Special leave, is not entitled to Subsidiary leave, save under the special orders of the Local Government.

Leave in and out of India.

323. (a) An officer (including a Military officer subject to the Military Leave Rules) may take Furlough or Special leave partly in and partly out of India. But Subsidiary leave is not admissible unless the Furlough or Special leave begins or, as the case may be, ends, as Furlough or Special leave out of India.

(b) If an officer going on Furlough or Special leave out of India is prevented by sickness or other reasons not within his own control,—such, for example, as the postponement of the departure of the vessel in which his passage is engaged,—from embarking within his Subsidiary leave, the Local Government may order that his Furlough or Special leave shall begin in India at the end of the Subsidiary leave otherwise admissible, without forfeiture of his Subsidiary leave.

Period admissible.

324. The minimum Subsidiary leave is ten days; otherwise Subsidiary leave is calculated according to the rules and restrictions laid down in Chapter IX for "Joining Time"

Prolongation of Subsidiary Leave.

325. If an officer has been absent from India for a period exceeding 12 months, he shall be entitled to a period of 12 months' leave, of which 6 months shall be Furlough leave and 6 months shall be Special leave.

1
7

A B having applied to us (or me) for medical certificate under Article 829 of the Civil Service Regulations, we (or I) consider it expedient, before granting or refusing such a certificate to A B, to detain him under professional observation for _____ days.

326. Unless an officer is expressly permitted by the Local Government _____ on leave, _____ article 829, _____ observation, _____ sible under _____ rule being prolonged if necessary in case of detention by a period not exceeding that for which he was detained.

327. In the case of an officer who fails to obtain the certificate, the time from the date on which he leaves his station to that on which the certificate is refused is treated as Subsidiary leave. From the date following that on which the certificate is refused the officer is treated as on Joining Time, carrying subsidiary leave allowances.

328. If an officer (including a Military officer subject to the Military Leave Rules) who, under the rules of his
in a troop-ship when proceeding on leave
granted Subsidiary leave, detained without
fault of his own, his subsidiary leave may be extended to the date of the sailing
of the vessel in which he is provided with a passage, without reference
to the maximum period of thirty days for which Subsidiary leave can be
granted.

329. Subsidiary leave is ordinarily reckoned from the date of debarkation,
but if there is any special delay in the issue of orders appointing an officer to a
particular post, the Subsidiary leave may be extended by the Local Govern-
ment, provided that the whole period so allowed does not exceed 30 days.

Leave Allowances.

330. An officer on Subsidiary leave is entitled to allowances as follows :—

(a) If the leave be subsidiary to Special leave, and the officer has had
leave subsidiary to a former Special leave—no allowance

(b) If the leave be subsidiary to ordinary Furlough or Special leave [other-
wise than as provided in clause (a)]—the allowance admissible under Article
314, but calculated, in the case of a member of the Indian Civil Service or a
Military officer subject to the Civil Leave Rules, without the limitations of
maximum or minimum prescribed by clauses (a) and (b) of Article 314. The
limitations prescribed by clause (c) of Article 314 apply to the allowances of
any other officer subject to this Article on Subsidiary leave.

(c) If the leave be subsidiary to Furlough other than ordinary—the
allowance admissible under Article 315.

(d) If the officer has been absent on extraordinary leave the duration
of which exceeds a fortnight, or has, under Article 229, ceased to have a lien
on an appointive appointment—

(i) in the case of a member of the Indian Civil Service or a Military Officer
subject to the Civil Leave Rules—subsistence allowance; and

(ii) in the case of any other officer subject to this Article—no allowance.

(e) If the leave be preparatory to retirement—the allowances which
would be admissible if the officer were proceeding on leave of such description
as may be admissible to him; and if no leave is admissible—subsistence
allowance only.

331. An officer may draw allowances as if he were on Privilege leave
for any part of his Subsidiary leave under clause (i) of Article 321 (a) for which,
if he were not retiring from the service or going on Furlough or Special leave,
Privilege leave may be admissible to him. It is to be observed that an officer
who has no lien on an appointment cannot benefit by this rule. (See Article 263.)

NOTE.—[This Article will have no application in cases in which Privilege leave is combined
with other leave under Article 233, as Subsidiary leave is not then admissible.] [See Article
312 (a)]

SECTION VI.—EXTRAORDINARY LEAVE.

332. Subject always to the provisions of any Statute applicable to the case, the Local Government (or, if the officer be on Furlough or Special leave in Europe, the Secretary of State) may, in special circumstances and when no other kind of leave is by rule admissible, grant leave of absence from duty otherwise than under these Regulations: Provided that—

- (i) such leave may not be granted in combination with the grant of other leave except as provided in Article 233. But it may be granted in continuation of other leave if circumstances arise which in the opinion of the Local Government are such as to justify the concession. No officer is entitled to Extraordinary leave;
- (ii) an officer absent from duty on leave so granted shall receive no absentee allowance; and
- (iii) if he is a member of the Indian Civil Service or a Military officer subject to the Civil Leave Rules, he shall retain no lien upon any office except when Extraordinary leave, not exceeding a fortnight, is granted in continuation of other leave. [See clause (d) of Article 330.]

1. In cases in which the duration of the Extraordinary leave to be granted does not exceed two months, the Local Government may dispense with the condition in this Article that the leave can be granted only when no other kind of leave is by rule admissible.

(see Articles 52 to 55),

(see Articles 220 to 231),

or so as to extend the term of Privilege or other leave beyond the time admissible by rule]

the person concerned.

absence from duty.

(2) If the further absence from duty cannot be covered in this way, the period, or such part of it as remains uncovered, will be treated as leave without allowances, unless the person concerned prefers to substitute leave of another description for that which he has previously taken.

Example.—A, who has had two months' Privilege leave, is detained for a further period of

333. A Military officer subject to the Civil Leave Rules, who has exhausted the full period of Furlough admissible to him under these Regulations, and who is granted Extraordinary leave on medical certificate, will continue to be treated as wholly in Civil employ for all purposes, with the exception that, if the Medical Board at the India Office report that there is no prospect of the officer returning to duty within a reasonable period, he will be placed on Military half pay. If an officer thus placed on half pay is afterwards permitted to revert to the effective list and returns to duty in India, he will not be entitled to be reinstated in Civil employment, but will be posted to Civil or Military duty as may be decided in India.

Chapter XIV.—Long Leave—Indian Services.

SECTION I.—EXTENT OF APPLICATION

334. The rules in this Chapter apply to all officers who are not entitled to leave under the other Chapters of these Regulations. They apply *fully* only to those officers whose pay is *not less* than Rs. 100 a month, and who have substantive appointments on permanent establishment under the Government.

335. (a) Leave may, however, be granted under this Chapter to an officer (whether he be a superior or an inferior servant) whose pay is less than Rs. 100, so far as it can be done without imposing any cost upon the State. The absentee allowance of the substantive incumbent must not exceed what remains from his pay after provision is made for the efficient discharge of his duties during his absence, except when, in the resultant acting arrangements, an officer who has no substantive appointment is given more than half the pay of the appointment in which he acts, in which case the excess over half pay granted to him may, at the discretion of the Local Government, be disregarded altogether in calculating the sum available for the leave allowance of the absentee and the acting allowances paid in consequence of his absence.

1. The Local Government may delegate its power under this clause to Heads of Offices and Departments.

(b) No leave in excess of the leave admissible under these rules may be granted to such an officer, with allowances, or counting as service for pension.

1. An officer holding an appointment on a Progressive pay, rising to a maximum of Rs. 100, who is in the receipt of the maximum pay, is not to be treated as an officer whose pay is less than Rs. 100.

2. If it becomes necessary to bring an officer from a distance to act for an officer on leave whose pay is less than Rs. 100, the travelling allowances and transit pay admissible to the substitute may be borne by the State; but such a transfer should never be made if it can be avoided.

3. The minimum allowance during long leave of a Naib Tahsildar in the United Provinces, or Baluchistan, is Rs. 30 a month.

SECTION II.—LONG LEAVE.

Leave on Medical Certificate.

336. Leave on Medical Certificate may be granted for three years in all, but not for more than two years at one time; and no officer can have Leave on Medical Certificate out of India more than twice.

1. An officer who has a temporary or officiating appointment only may be allowed leave under this Article for not more than three months at one time, if no substitute is required, or if his duties can be provided for without additional expense.

Leave on Private Affairs.

337. Leave on Private Affairs for six months may be granted to an officer who has not had Furlough, after six years' service, and repeated after intervals of six years.

1. Leave on Private Affairs does not accumulate, and cannot be taken in instalments.
2. Leave on Medical Certificate counts as service for Leave on Private Affairs.

Furlough.

338. Furlough may be granted as follows—

(a) After ten years' service—one year or any less period; and thereafter at intervals of not less than eight years, one year or such other period as together with all periods already spent on Furlough may not exceed two years; or,

(b) After eighteen years' service—two years or any less period; and thereafter, at intervals of not less than eight years, any such period as together with all periods already spent on Furlough may not exceed two years:

Provided that—

- (i) The service for Furlough of an officer who has had Leave on Private Affairs counts only from the date of his last return from such leave;
- (ii) The aggregate amount of Furlough, or of Furlough and Leave on Private Affairs taken together, shall not exceed two years;
- (iii) An interval of not less than eighteen months has elapsed between last return from privilege leave of over six weeks' duration, whether taken by itself or combined with Leave on Medical Certificate, and the furlough, or privilege leave, if any, with which the furlough is combined.

1. Leave on Medical Certificate counts as service for Furlough.

NOTE.—[The restriction in clause b(iii) of this Article may be relaxed by the Government of India in cases in which its enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State.]

Leave without Allowances.

339. Extraordinary leave without allowances may, in case of necessity, and when no other leave is by rule admissible, be granted for such time as may be necessary. Time spent on leave under this Article does not

count as service for other leave. Subject to the provisions of Article 198, there is no limit to the length or frequency of leave under this Article. It may not be granted in combination with the grant of other leave except as provided in Article 233. But it may be granted in continuation of other leave if circumstances arise which prevent the return by the officer to duty, and which, in the opinion of the Local Government or the authority empowered to grant the leave, are such as to justify the concession. No officer is entitled to Extraordinary leave.

1. In cases in which the duration of the Extraordinary leave to be granted does not exceed three months, the Local Government or the authority empowered to grant the leave may, at its discretion, grant the leave for a shorter period than the full period.

Leave Allowances.

340. (a) An officer on Leave on Medical Certificate under Article 336 is entitled to half his average salary for the first fifteen months of each period of such leave, but not for more than thirty months in all. For the rest of his leave under Article 336 he is entitled to a quarter of his average salary.

(b) An officer on Furlough or on Leave on Private Affairs is entitled to half his average salary.

(c) But whenever an officer whose appointment is not gazetted takes leave for not more than one month, or whenever such an officer's salary is less than Rs. 300, his pay (not salary) when he gives up office is to be taken in lieu of average salary.

341. (a) Half average salary is subject to the following maxima :—

- (i) if paid in India, Rs. 666½ a month in the case of officers of the Provincial Civil Service holding "listed" appointments and Rs. 500 a month in the case of other officers;
- (ii) if paid at the Home Treasury £600 a year.

(b) Quarter average salary is subject to a maximum of Rs. 400 a month if paid in India, and £480 a year if paid at the Home Treasury.

(c) For non-gazetted officers whose salary is not less than Rs. 300, the minimum of half average salary is Rs. 150, and of quarter average salary Rs. 75 a month.

NOTE 1.—[Absence allowances in respect of leave granted under this Article are not payable in the case of officers of the Indian Civil Service.]

NOTE 2.—[For the purposes of this Article, Ceylon and the Straits Settlements are not held to be "out of India."]]

342. The half average salary and quarter average salary of an officer subject to the rules in this Chapter if on leave out of India (except in Ceylon or the Straits Settlements) are subject to the following minima :—

- (a) if the leave is Leave on Medical Certificate under Article 336, or
- (b) if the leave, although not Leave on Medical Certificate under Article 336, has been granted on account of ill-health.

Half average salary—

	Minima
If paid in England	£200 a year, or $\frac{1}{4}$ ths of the salary last drawn on duty, whichever is less
If paid in India	Rs. 160½ a month, or $\frac{1}{4}$ ths of the salary last drawn on duty, whichever is less

Quarter average salary—

If paid in England	£100 a year, or $37\frac{1}{2}$ per cent. of the salary last drawn on duty, whichever is less.
If paid in India	Rs. 83½ a month, or $37\frac{1}{2}$ per cent. of the salary last drawn on duty, whichever is less.

NOTE.—[The benefit of this Article is admissible only in cases in which a Medical Certificate in the form prescribed in Chapter XLIV recommends leave out of India, or in which leave (except Extraordinary Leave without allowances) spent out of India, whether so recommended or not, is extended on Medical Certificate or commuted into Leave on Medical Certificate.]

343. All the rules in Article 340 are subject to the proviso that the allowances of an officer during leave shall in no case exceed his actual salary when he takes leave.

344. An officer does not forfeit the allowances to which he is entitled under Articles 340 to 343 by resigning the Service at the end of the leave.

Leave after fifty-five years of age.

345. An officer in Superior service who is subject to the rules of this Chapter is eligible, after he attains the age of fifty-five years, for Privilege leave, for any Leave on Private Affairs (Article 337) to which he may be otherwise entitled, for Subsidiary Leave preparatory to retirement, and also for leave without allowances under Article 339, provided that the total leave granted, whether on private affairs or without allowances, does not exceed six months in all, and for no other kind of leave. Any leave, other than Privilege leave or Leave on Private Affairs or Subsidiary Leave preparatory to retirement, granted to such an officer before the date on which he attains the age of fifty-five years, ceases to have effect on this date.

NOTE.—[Except in the case of an officer who, after the age of 54 years, has been refused leave owing to the exigencies of the public service, the grant of leave under this Article is subject to the condition that the officer returns to duty at the end of the leave. In applying for leave the officer must record a declaration that he has no intention of retiring for three months after his return to duty.]

SECTION III.—SUBSIDIARY LEAVE.

346. An officer going on, or returning from, Leave out of India on Medical Certificate, Leave on Private Affairs, or Furlough, is entitled to Subsidiary

NOTE.—[When Privilege leave is combined with other leave under Article 233, Subsidiary leave is not admissible to an officer going on leave.]

347. Subsidiary leave on half pay for not more than fourteen days may be granted to an officer leaving India by sea on retirement, provided that the grant causes no additional expense to the State.

348. (a) An officer on Subsidiary leave prefixed to other leave is entitled to half average salary. But he may draw allowances as if he were on Privilege leave, for any part of this leave for which, if he were not going on Leave out of India, Privilege leave would be admissible.

NOTE.—[See Note under Article 331.]

(b) An officer on Subsidiary leave following other leave is entitled to half or quarter average salary, according to the rate of allowance to which he is entitled at the end of the leave to which it is subsidiary.

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PART IV.—ORDINARY PENSIONS.

Chapter XV.—General Rules.

SECTION I.—EXTENT OF APPLICATION.

348A. Every pension shall be held to have been granted subject to the conditions contained in Chapter XXI.

349. The conditions of service of officers of the following classes include special rules for pension which are laid down in the chapters noted against each, viz. —

- (a) Judges of the High Courts (see Chapter XXIII).
- (b) Barristers holding the appointments specified in Article 547 (see Chapter XXIV).
- (c) Members of the Indian Civil Service (see Chapter XXV).
- (d) Statutory Civil Servants (see Chapter XXVI).
- (e) Ecclesiastical Officers (see Chapter XXVII).
- (f) Civil Engineers and Telegraph Officers (see Chapter XXX).
- (g) State Railway Establishments (see Chapter XXXII).
- (h) Bengal Covenanted Pilots (see Chapter XXXIII).
- (i) Police Officers drawing less than Rs. 20 a month (see Chapter XX).
- (j) Port Blair Police (see Chapter XXXIV).
- (k) Army Veterinary Officers of the Civil Veterinary Department (see Chapter XXIX).
- (l) Burma Military Police (see Chapter XXXVII).

350. *in this service*

1 Service in Dāk Bungalow and District Garden Establishments does not qualify

2 The service of a Patwari, whether appointed before or after the abolition of the Patwari or Village Officers' Cesses and Funds, does not qualify in any case in which it did not qualify prior to that abolition.

351. Future good conduct is an implied condition of every grant of a pension. The Local Government, the Government of India, and the Secretary of State in Council reserve to themselves the right of withholding or withdrawing a pension or any part of it, if the pensioner be convicted of serious crime or be guilty of grave misconduct.

The decision of the Secretary of State in Council on any question of withholding or withdrawing the whole or any part of a pension under this Regulation shall be final and conclusive.

NOTE.—[This rule is applicable to all the officers enumerated in Article 349 except Judges of the High Courts, Bishops, Army Veterinary Officers of the Civil Veterinary Department and members of the Civil Service appointed before 16th January 1904.]

SECTION II.—CASES IN WHICH CLAIMS ARE INADMISSIBLE.

352. In the following cases no claim to pension is admitted :—

(a) When an officer is appointed for a limited time only, or for a specified duty, on the completion of which he is to be discharged.

(b) When a person is employed temporarily on monthly wages without specified limit of time or duty ; but a month's notice of discharge should be given to such a person, and his wages must be paid for any period by which such notice falls short of a month.

(c) When a person's whole time is not retained for the public service, but he is merely paid for work done for the State.

1. This clause applies, among others, to the following officers :—Advocate General, Solicitor to Government, Government Pleaders and Law Officers not debarred from private practice, Sheriffs in Presidency towns, Coroners, Roman Catholic Priests

(d) When a public servant holds some other pensionable office, he earns no pension in respect of an office of the kind mentioned in clause (c) or in respect of duties paid for by a Local Allowance.

(e) When an officer serves under a covenant which contains no stipulation regarding pension, unless the Government of India specially authorises an officer to count such service towards pension.

executed

"Covenants with mechanics and others engaged for service in India will accordingly in future be prepared containing provisions to the effect recommended by your Government."

Misconduct or Inefficiency.

353. No pension may be granted to an officer removed for misconduct, insolvency or inefficiency ; but to officers so removed compassionate allowances may be granted by the Government of India in cases where the pay of the officer does not exceed Rs. 800 a month, or by a Provincial Government in the case of officers serving under it whose pay does not exceed Rs. 500 a month, when they are deserving of special consideration ; provided that, without the sanction of the Secretary of State.

(1) no allowance shall be granted to an officer appointed in England, and

(2) the allowance granted to any officer shall not exceed two-thirds of the pension which would have been admissible to him if he had retired on medical certificate.

Unfitness for Further Advancement.

353A. When an officer, belonging to one of the following services, who is proved to be unfit for further advancement, is removed from service by the Secretary of State on the recommendation of the Local Government and the Government of India, he may, with the sanction of the Secretary of State, be granted a pension not usually exceeding, and not necessarily so great as, that which would have been admissible to the officer if he had been invalided on medical certificate. In making their recommendations in such cases, the Government of India and the Local Government will be guided by the circumstances of each case and are not debarred from proposing, if the circumstances justify it, a pension lower or (in exceptional cases) higher in amount than that which would be admissible to the officer if he was invalided on medical certificate :—

- (a) The Indian Civil Service.
- (b) The Indian Political Department.
- (c) The Indian Finance Department (General List, including the Public Works List).
- (d) The Imperial Police Service.
- (e) The Imperial Customs Service.
- (f) The Post Office of India and the Indian Telegraph Department.
- (g) The Geological Survey of India.
- (h) The Engineer establishment of the Indian Public Works and State Railway Departments.

NOTE 1.—[In the case of the military officers belonging to the Indian Political Department the pension recommended will be based on the amount of retiring pension which an officer

Claims of Widow.

354. (a) It being the duty of every Government officer himself to provide for his family, the Government recognises no claim by a widow on account of the services of her husband, and is almost invariably under the painful necessity of rejecting recommendations made in contravention of this rule.

(b) The submission of such recommendations, save under very extraordinary circumstances, is disapproved, as calculated only to give rise to hopes which cannot be fulfilled.

Limitations.

355. (a) An officer cannot earn two pensions in the same office at the same time, or by the same continuous service.

(b) Two officers may not simultaneously count service in respect of the same office.

Military Service.

356. Service which is pensionable under Military Rules does not count; and an officer who is counting service for Military pension cannot simultaneously count service for Civil pension. The following exceptions have been made to the provisions of this Article:—

Hospital Assistant or Native Doctor, as the case may be, irrespective of the particular age at which the examination may be passed. [See Article 358 (a) and 359 (3)]

(2) In the Public Works or Railway Department, Departmental Commissioned Officers

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following offices:—

Army Head Quarters Offices,
Northern and Southern Army Offices,
Divisional Offices,
Brigade Offices, and
The late Command, District and 1st class Station Staff Offices prior to 1st June 1907.]

PART IV.

ment.

357. The Local Government may, in exceptional cases, allow service which is pensionable under Military rules to count for pension on the Inferior scale

Chapter XVI.—Conditions of Qualifying Service.

SECTION I.—DEFINITION OF QUALIFYING SERVICE.

Beginning of Service.

358. (a) Except for Compensation gratuity, an officer's service does not in the case of Superior service qualify till he has completed twenty years of age.

(b) In other cases unless it be otherwise provided by special rule or contract, the service of every officer begins when he takes charge of the office to which he is first appointed.

NOTE.—[In every covenant with an officer appointed in England by the Secretary of State, not being a member of the Indian Civil Service or a Civil Engineer or Telegraph Officer educated at the Royal Engineering College, Coopers Hill, or a Forest Officer, a clause is inserted to the effect that service for leave and pension begins only from the date on which the officer joins his first appointment in India.]

359. The following exceptions are admitted to the twenty years' rule :—

(1) All officers appointed in England by the Secretary of State; "Indian College Engineers" [see Article 627 (e)]; and Police probationers appointed in India under the orders contained in the Despatch of the Secretary of State, No. 14 (Judicial), dated 15th March 1891

(2) Signallers in the Indian and Indo-European Telegraph Department may count towards pension service rendered by them after they attain the age of eighteen years.

ing as service the period during which the establishment is not employed does not apply to an officer who was not on actual duty when the establishment was discharged, after completion of its work, or to an officer who was not on actual duty on the first day on which the establishment was again re-employed.

370. An officer transferred from a temporary to a permanent appointment can count his service in the temporary office, if, though at first created experimentally or temporarily, it eventually becomes permanent.

371. An officer without a substantive appointment officiating in an office which is vacant, or the permanent incumbent of which does not draw any part of the pay or count service, may, if he is confirmed without interruption in his service, count his officiating service.

Apprentices and Probationers.

372. Service as an apprentice does not qualify, except in the following cases —

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W. 4s and Rail.

373. The service of a probationer who holds a substantive office and draws substantive pay qualifies. So does that of an officer who is on probation for a substantive office, if he is employed in a vacancy reserved for him, pending probation, and in which no other officer simultaneously counts service.

374. Police probationers and temporary and officiating Assistant Superintendents of Police in all Provinces count their service as follows :—

- (1) If recruited in England—from the date on which they report their arrival in India.
- (2) If recruited in India under the orders in Secretary of State's despatch No. 14, dated the 15th March 1894—from the date of assuming charge of their appointments.
- (3) If recruited in India before the date of the orders of 1894 mentioned in (2) above—from the date either of attaining the age of 20 years or of assuming charge of their appointments, whichever is later, provided that the service has been continuous.

375. The service of :

- (1) Probationary, officiating and temporary Deputy Magistrate-Collectors and Sub-Deputy Collectors and sub. *pro tem*. Sub-Deputy Collectors in Bengal, Bihar and Orissa and Assam,
- (2) Probationary, officiating and temporary Deputy Collectors in the United Provinces,
- (3) Probationary, officiating and temporary Extra Assistant Commissioners in the Punjab and Assam, and
- (4) Officiating and temporary Extra Assistant Commissioners in the Central Provinces.

counts for pension from the date on which all the three following conditions are fulfilled, namely :—

- (a) Two years' continuous probationary or officiating service as such has been rendered ;
- (b) Departmental examinations have been fully passed ; and
- (c) The age of twenty years has been attained.

NOTE 1.—[The above conditions do not apply to Deputy Collectors and Sub-Deputy Collectors who began service in the Settlement Department on a temporary footing and were promoted to be probationary officiating or sub *pro tempore* Deputy Collectors or Sub-Deputy Collectors in the provincial and subordinate civil services. Such officers are allowed to count the whole of their continuous service for pension from the date of their first appointment in the Settlement Department.]

NOTE 3.—[Sub-Deputy Collectors in Bengal and Bihar and Orissa who were appointed before the 1st July 1909 and were brought under the provisions of the rules for Deputy

pro tempore Sub-Deputy Collector.]

Permanent Officer deputed.

376. An officer on a permanent establishment detached on temporary duty, on the understanding that, when the temporary duty ceases, he will return to the permanent establishment, counts his detached service.

377. The preceding Article permits the temporary suspension of the second condition of qualifying service which forms the subject of this Section ; it does not authorise any relaxation of the first condition (Section II), or the third condition (Section IV), and, in particular, must not be understood to countenance any modification of the rules in Part VII, which apply to an officer on Foreign Service.

378. Service as Private Secretary to the Governor-General, a Governor or a Lieutenant-Governor, qualifies, provided that the officer belonged, before his appointment as Private Secretary, to the Civil Service of Government, whether the Indian Civil Service or not.

Substantive Office abolished.

379. If the substantive office of an officer is abolished within the meaning of Article 426, but the officer is, at the time, on special duty, or is, on abolition of his office deputed on special duty, his service on special duty qualifies, but the duty must be *special*; mere employment, in continuation of permanent employment, in a temporary appointment which happens at the time to be vacant, does not qualify.

1. The service of an officer of the Marine Service continues to qualify when, upon the abolition of his appointment, he is retained on subsistence allowance or in an acting appointment.

Piece-work.

380. A Press servant, who is paid for piece-work, is treated as having held a substantive office, if—

- (i) he is employed, not casually, but as a member of a fixed establishment; and
- (ii) during the last seventy-two months of his actual employment he has been attached to one office uninterruptedly for twenty-four months, or it has not been through his own choice or misconduct that he has not been so attached.

Surveys and Settlements.

381. (a) The service of an officer not merely temporarily engaged in the undermentioned Settlement and Survey Departments which are (or were) on a quasi-permanent footing qualifies :—

(b) Except in the regular Departments and to the extent above specified, Settlement and Survey service does not count unless it is followed, without interruption, by qualifying Service. Settlement Service followed, without interruption, by pensionable service paid from a Patwari Fund also qualifies.

NOTE 1.—[From the dates mentioned, the following posts have been declared to be on a quasi-permanent footing.—

- (a) In a Settlement Office in the United Provinces from 1st October 1899—

Head and Second Clerk.	Settlement Officer's Reader.
Sadr Munsam.	Nazir and Record-keeper.
- (b) In the Settlement Establishment in Baluchistan from 1st September 1904—

Superintendent (pay Rs. 150), 1 Deputy Superintendent (pay Rs. 90), 1 Deputy Superintendent (pay Rs. 75), 2 Munsams (pay Rs. 60 each), 2 Munsarims (pay Rs. 40 each), 1 Head Clerk (pay Rs. 90), 1 Second Clerk (pay Rs. 65), 1 Extra Assistant Comptroller (pay Rs. 40), 1 Nazir (pay Rs. 30), 1 Nazir to Settlement.	
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Service in these posts qualifies from the dates mentioned or from any previous date from which the incumbents on 1st October 1899 or 1st September 1904 (as the case may be) may have been serving substantively and without interruption in one or other of them.]

NOTE 2.—[Continuous service as Inspector, Surveyor, Holding Marker, Draughtsman, Comptroller and Clerk belonging to Special and Revision Survey parties in Burma qualifies.]

382. Deputy Collectors and similar gazetted officers, when not especially employed for temporary work, are not affected by the preceding article, as they count service independently of the particular department to which they happen for the time to be attached.

Exception.

383. A Medical Officer in charge of a Government vessel may count his service afloat, if he is transferred, without interruption of his service, to the Civil Medical Service.

384. Officers transferred from the Extra or Contingent List of the Customs Preventive Service in Burma or in Calcutta count their service on that list, provided the Collector declares that the transfer is made on the ground of good service rendered.

SECTION IV.—THIRD CONDITION.

Sources of Remuneration.

385. Service which satisfies the conditions prescribed in Sections II and III qualifies, or does not qualify, according to the source from which it is paid; with reference to this Article, service is classified as follows:—

- (a) Paid from the General Revenues.
- (b) Paid from Local Funds.
- (c) Paid from Funds in respect to which the Government holds the position of Trustee.
- (d) Paid by Fees levied by law, or under the authority of the Government, or by Commission.
- (e) Paid by the Grant, in accordance with law or custom, of a tenure in land, or of any source of income, or right to collect money.

General Revenues.

386. Service paid from the General Revenues qualifies. The fact that arrangements are made for the recovery, on the part of the Government, of the whole, or part, of the cost of an establishment or officer, does not affect the operation of this principle: Provided that the establishment or officer is appointed, controlled, and paid by the Government.

for by shipping fees.

by local subscriptions.

(c) Certain Customs establishments in Bombay, the cost of which is paid for by private companies.

Revenues.—[See Article 493 (b).]

(g) An establishment of the Accountant General of the High Court at Bombay whose pay is provided for by a three per cent. commission on invested funds in charge of the Accountant-General.

(A) The office establishment of the Health Officer of the Port of Bombay and the crew of the boat placed at the disposal of that officer, a portion of whose pay is paid by the Bombay Port Trust.

387. The service of members of office establishments in the Railway Police in Bombay, who are wholly paid by the Railway Companies, qualifies.

388. Service which was paid wholly or partly from the Revenues of Berar before 1st October 1902 qualifies for pension from General Revenues.

389. (a) In the case of officers who, having no status in the service of the British Government, apart from their particular employment in Mysore, were employed in Mysore and transferred to the British service proper before 1st October 1882, the pensions granted are charged according to the Rule of Proportions.

(b) Pensions for service in Mysore prior to 1st October 1882 of officers who had a status in the service of the British Government apart from their particular employment in Mysore, are paid wholly from British Revenues.

Local Funds and Trust Funds.

390. Service paid from a Local Fund qualifies, or does not qualify, according to the rules laid down in Chapter XLII.

391. Service paid from Funds which Government hold only as a Trustee, such as under a Court of Wards or in an Attached Estate, does not qualify.

Fees and Commission.

392. Except when fees or commission are drawn in addition to pay from the General Revenues, service in an office paid only by fees, whether levied by law or under the authority of Government, or by a commission, does not qualify.

1 Service as Official Assignee does not qualify.

2 Service as a Thugyi (local collector of revenue paid by commission) in Lower Burma qualifies, but this concession does not extend to Upper Burma,—*vide* Rule 2 under Article 350

Tenures in Land, etc.

393. Service paid by the grant, in accordance with law or custom, of a tenure in land, or of any other source of income, or right to collect money, does not qualify.

394. As an exception to the preceding Article, Watandars (hereditary District Officers) and their deputies in the Kaira Collectorate and in the following talukas of the Panch Mahals, namely—Godhra, Kalol and Dohad, and the Petás of Hálol and Jhalod, if transferred to qualifying service, count their previous service.

SECTION V.—DISTINCTION BETWEEN SUPERIOR AND INFERIOR SERVICE.

395. Qualifying service is divided into SUPERIOR and INFERIOR.

396. Service on pay not exceeding Rs. 10, and service in any office which has been graded as inferior by the rule or practice of the Local Government, is Inferior service. All other service is Superior service.

(Appendix 7A contains a list of appointments specially classed as Superior and Inferior.)

397. *Cancelled.*

Service partly Inferior and partly Superior.

398. An officer whose service has been for some time Inferior and for some time Superior may either count—

- (a) the whole as Inferior towards pension or gratuity on the Inferior scale, or
- (b) the Superior portion towards pension or gratuity on the Superior scale, and the Inferior portion towards gratuity on the Inferior scale.

Under (a) the pension or gratuity is calculated on the pay (whether in Superior or Inferior service) which the officer drew immediately before his retirement.

Under (b) the pension or gratuity on the Superior scale is calculated upon the average emoluments or emoluments respectively which the officer drew when last in Superior service, and the gratuity on the Inferior scale upon the pay which he drew when last in Inferior service; provided that the total gratuity or gratuity plus pension granted under this clause shall not exceed what would have been admissible, if the whole service had been Superior.

If an officer has been reduced from the Superior to the Inferior class for misconduct, he cannot have the benefit of this Article, without the special permission of the Local Government.

399. The claims of an officer, promoted from an Inferior to a Superior grade as a reward for meritorious service, will be specially considered by the Government of India or by the Local Government under whom the officer is serving. This rule is to be strictly interpreted and a claim under it can be founded only on exceptional promotion made out of the ordinary course.

Exceptional Cases.

400. If an officer holds two or more offices, each of which is Inferior by reason of its pay not exceeding Rs. 10, he cannot count service as Superior, on the ground that his aggregate pay exceeds Rs. 10 unless the offices were arranged and their pay determined with the intention that they should be held by one individual.

401. The service of a postman or village postman, whatever his pay, is Superior service.

402. (a) When the regular duties of an officer whose pay exceeds Rs. 10 but who bears an Inferior designation, are really such as are ordinarily performed by a Superior servant, his claim to pension should be specially referred to the Local Government.

NOTE.—[It is not intended by this Article that an Inferior servant should count service as Superior in virtue of his voluntarily assisting in Superior work. It provides for the case of a person who is engaged under due authority to do Superior work, though with an Inferior designation.]

(b) On the other hand, an officer whose real duties are those of an Inferior servant, even though his pay exceeds Rs. 10, is not entitled to pension on the Superior scale merely because he draws pay under a Superior designation.

Examples—Accountants in the Province of Agra who served under the designation of "Potdars" A Lithographic Pressman designated as a Copying Clerk.

Chapter XVII.—Rules for Reckoning Service.

SECTION I.—SPECIAL ADDITIONS.

Special Appointments.

403. Subject to the restriction specified against the first five offices, an incumbent of one of the offices enumerated below, appointed on account of professional or other special qualifications, whose whole pensionable service has been passed in one or other of such offices, shall, if appointed at an age exceeding 25, be entitled to reckon as service qualifying for superannuation pension (but not for any other class of pension) the number of completed years by which his age may at the time of appointment have exceeded 25 years, subject to the proviso that five years shall be the maximum period which can be so added.

1. Deputy Legal Remembrancer, Bengal.

2. Assistant Secretary to the Bengal Legislative Council.

3. Presidency Magistrates.

4. City Civil Judge, Madras.

5. Judges of the Small Cause Court at a Presidency Town (other than the Chief Judges) and at Rangoon.

6. The Astronomer, Madras.

7. Director of the Colaba Observatory.

8. Members of the Indian Educational Service who entered that Service after the 23rd July 1896.

9. Superintendent of the Government Museum and Principal Librarian of the Connemara Public Library, Madras.

When Barristers, Advocates, Solicitors, or Vakils.

NOTE.—[The extra years conceded under this Article count towards the limit of 28 years' qualifying service prescribed in Article 475, in the case of the officers mentioned in the latter rule or to whom its provisions may be specially extended.]

Exception—Subsequent promotion to an appointment which is not one of the offices enumerated in this Article, but is of similar nature and carries not less pay, does not deprive an officer of the concession prescribed above,

provided that he has, when so promoted, completed not less than five years' qualifying service in one of the offices enumerated in this Article.

404. In the case of officers who were in the Education Department on 23rd July 1896, the following rule applies.

For the purpose of calculating the amount of pension ordinarily admissible to an officer, not being a Native of Asia, whose qualifying service began after 25 years of age, and whose service for which pension is claimed amounts to not less than ten years, and has been passed wholly in one or other of the following offices, three years shall be added to the qualifying service :—

1. Directors of Public Instruction.
2. Inspectors of Schools.
3. Principals and Professors of Colleges.
4. Head Masters of Colleges and High Schools.

NOTE.—[The extra years conceded under this Article count towards the limit of 28 years' qualifying service prescribed in Article 475, in the case of the officers mentioned in the latter rule or to whom its provisions may be specially extended.]

405. *Omitted.*

406. *Omitted.*

SECTION II.—PERIODS OF LEAVE.

Superior Service.

407. Except as provided in Article 408, time passed on leave other than Privilege leave or Subsidiary leave does not count as Superior service.

408. Time passed on leave with allowances counts as service as follows :—

If the total service of the Officer is not less than—	He counts as service a period of leave out of India not exceeding—	He counts as service a period of leave in India not exceeding—
15 years	1 year	1 year.
20 "	2 years.	"
25 "	3 "	"
30 "	4 "	2 years.
35 "	5 "	"

NOTE 1.—[The periods in columns 2 and 3 are not cumulative, that is, an officer may not count two years' leave in 15 years' service or more than four years' leave in thirty years' service. The maximum amount of leave both in and out of India which may be counted is that shown in column 2.]

NOTE 2.—[Total service in this Article means total service reckoning from the date of commencement of service qualifying for pension and includes periods of leave.]

NOTE 3.—[For the purposes of this Article, Ceylon and the Straits Settlements are not held to be "out of India."]

409. Time passed on Departmental leave by subordinates in the Survey of India and in the Bengal and Bihar and Orissa Survey Departments whose service is superior counts, provided they return to duty when required by their superior officers.

NOTE.—[Departmental leave granted to Tindals and others under clause (u) of Article 295 and to inferior servants in the Bengal and Bihar and Orissa Survey Departments employed purely on field work is treated as service qualifying for pension.]

410. Time passed on leave obtained to be present at an examination which must be passed before an officer is eligible for higher subordinate appointments, such as Deputy Magistracies, counts—(See Article 285).

411. The Government of India may at its discretion decide in the case of an officer (including a person in training for, but not actually appointed to Government service) who is selected for undergoing a course of study, that

it.

NOTE 1.—[The Government of India and Local Governments may delegate their power under this Article to Heads of Departments as regards officers serving under them.]

NOTE 2.—[The Government of India or a Local Government may issue general orders under this Article in regard to any specified class of officers under training.]

Deputation out of India.

412. When an officer is deputed out of India on duty, the whole period of his absence from India counts. When an officer on leave out of India is employed, or is detained after the termination of his leave, on duty, the period of such employment or detention counts.

Recall to Duty.

413. Time spent on the voyage to India by an officer who is recalled to duty before the expiry of any recognised leave out of India counts, provided his return to duty is compulsory (see Article 199).

Inferior Service.

414. An Inferior servant counts leave with and without allowances not exceeding in the aggregate that which might be given with allowances under the rules in Chapters XII and XIV.

415. *Cancelled.*

SECTION III—SUSPENSIONS, RESIGNATIONS, BREAKS, AND DEFICIENCIES IN SERVICE.

Periods of Suspension.

416. Time passed under suspension pending enquiry into conduct counts, if the suspension is immediately followed by reinstatement, but time passed under suspension adjudged as a specific penalty does not count.

417. If an officer, who has been suspended, pending enquiry into his conduct, is reinstated, but with forfeiture of any part of his allowances for the period of suspension, this period does not count (save with the special sanction of the Head of the Department), unless the authority who reinstates the officer expressly declares at the time that it shall count.

Resignations and Dismissals.

418. (a) Resignation of the public service, or removal from it for misconduct, insolvency, inefficiency not due to age, or failure to pass a prescribed examination entails forfeiture of past service.

(b) Resignation of an appointment to take up another appointment, service in which counts, is not a resignation of the public service.

419. Any authority who, on revision or appeal, reverses an order dismissing an officer, may declare that the officer's past service counts.

Interruptions.

420. An interruption in the service of an officer entails forfeiture of his past service, except in the following cases :—

- (a) Authorised leave of absence.
- (b) Unauthorised absence in continuation of authorised leave of absence so long as the office of the absentee is not substantively filled ; if his office is substantively filled, the past service of the absentee is forfeited.
- (c) Suspension immediately followed by reinstatement, which need not be to the same office.
- (d) Abolition of office or loss of appointment owing to reduction of establishment.
- (e) Transfer to non-qualifying service in an establishment under Government control. The transfer must be made by competent authority ; an officer who voluntarily resigns qualifying service cannot claim the benefit of this exception. Transfer to a grant-in-aid school entails forfeiture. [*But see Example (c) of Article 386.*]
- (f) Transfer to service on the Household establishment of the Viceroy.
- (g) Time occupied in transit from one appointment to another, provided that the officer is transferred under the orders of competent authority, or, if he is a non-gazetted officer, with the consent of the head of his old office.

421. The authority who sanctions the pension may commute retrospectively periods of absence without leave into leave without allowances.

Condonation of Interruptions and Deficiencies.

422. Upon such conditions as it may think fit in each case to impose the authority competent to sanction the pension of an officer may condone all interruptions in his service.

NOTE.—[The powers under this Article shall be exercised subject to any rules which the Government of India may deem fit to prescribe.]

423. (1) Upon any conditions which it may think fit to impose, the authority competent to sanction the pension of an officer may condone a deficiency of three months in his qualifying service.

(2) If besides his qualifying service an officer has rendered actual service paid from General Revenues, but not counting for pension, or if an officer claiming a pension for Superior service has also rendered Inferior service the Government of India or the Provincial Government under whom the officer is serving, may condone a deficiency in his qualifying service not exceeding half his non-qualifying or Inferior service, as the case may be, subject to a maximum of twelve months in all.

NOTE—[The two clauses of this Article are alternative and not cumulative.]

423A Cancelled.

Chapter XVIII.—Conditions of Grant of Pension.

SECTION I.—CLASSIFICATION OF PENSIONS.

424. Pensions for "Superior service" are divided into four classes, the rules for which are prescribed in the following Sections of this Chapter—

- (a) Compensation pensions (see Section II)
- (b) Invalid pensions (see Section III).
- (c) Superannuation pensions (see Section IV).
- (d) Retiring pensions (see Section V).

425. Pensions for "Inferior service" are regulated by Articles 481 to 485.

SECTION II.—COMPENSATION PENSION.

An appointment, the pay which of is reduced as part of a general scheme of revision, is abolished within the meaning of this Article. But in such case it may sometimes be cheaper to grant a personal allowance than a pension.

NOTE (1).—["You report the case of an Overseer of eight years' service, whose pay was

10th September 1879.)]

427. To pension an officer still capable of useful service is a waste of public money; before a pension is granted to such an officer discharged on abolition of appointment, it must be carefully considered whether he cannot be otherwise provided for. The head of a department, in forwarding an application for

Compensation pension, should invariably state for what reasons it has been found impossible to provide suitable employment for the applicant.

Selection for Discharge.

428. The selection of the officers to be discharged upon the reduction of an establishment should *prima facie* be so made that the least charge for Compensation pension will be incurred.

429. The discharge of one officer to make room for another better qualified is not the abolition of an appointment within the meaning of Article

wise it may perhaps be better to postpone the reduction of establishment or abolition of appointment.—(See orders printed as Appendix 8.)

NOTE.—[The relaxation of the condition laid down in this Article requires the sanction of the Provincial Government in respect of appointments which it is competent to abolish, and otherwise of the Government of India.]

Restrictions.

430. A Deputy Collector, Munsiff, or similar officer who belongs to the public service, apart from his particular local appointments cannot obtain a Compensation pension on the abolition of a particular appointment.

431. No pension is admissible to an officer for the loss of an appointment on discharge after the completion of a specified term of service.

432. No pension may be awarded for the loss of a local allowance.

433. Schoolmasters or other officers who, in addition to their other duties, are employed in any capacity in the Postal Department, are not entitled to Compensation pension on being relieved of such duties.

Special Cases.

434. If it is necessary to discharge an officer in consequence of a change in the nature of the duties of his office, the case should be referred to the Local Government, who will deal with it in accordance with the rules laid down in this Section as to notice of discharge and compensation pension or gratuity.

435. If of two appointments held by one officer only one is abolished and it is desired to give him an immediate pension in respect of the abolished post, the case should be specially referred for the orders of the Government of India or of the Provincial Government competent to abolish the appointment.

Notice of Discharge.

436. Reasonable notice should be given to an officer in permanent employment before his services are dispensed with on the abolition of his office. If in any case, notice of at least three months is not given, and the officer has not

been provided with other employment on the date on which his services are dispensed with, then, with the sanction of the authority competent to dispense with the officer's services, a gratuity not exceeding his emoluments for the period by which the notice actually given to him falls short of three months, may be paid to him, in addition to the pension to which he may be entitled under Articles 474 to 481 ; but the pension shall not be payable for the period in respect of which he receives a gratuity in lieu of notice.

any gratuity.

2 Unless it contains an express statement to the contrary, an order for the abolition of

NOTE—[" Emoluments " in this rule means the emoluments or leave allowances (or partly the one, partly the other) which the officer would be receiving during the period in question, had the notice not been given him]

436A. Whenever it is found necessary to determine the service of an officer serving under a contract within the period of his agreement, a specific intimation of the determination of the agreement and of the grounds on which it has been determined shall be furnished to the officer in writing.

Offer of Re-employment.

437. An officer discharged with a Compensation pension may not, without surrendering his pension, refuse to accept any appointment which the Local Government thinks fit, within six months from the date of his discharge, to

equitably be expected to accept.

438. The rule in Articles 511 and 512, requiring the refund of a Compensation gratuity on re-employment, applies to a gratuity awarded under Article 436, if the officer is permanently re-employed within three months from the date of notice. But the officer need not refund that proportion of his gratuity under this rule which the interval of his non-employment bears to the whole period for which the gratuity is given. If the officer is re-employed only temporarily, he need refund no part of his gratuity ; but if such temporary employment is foreseen, the gratuity should be proportionately reduced.

439. Article 437 applies also to the case of an officer entitled to Compensation pension, who, upon the abolition of his own appointment, is transferred by competent authority to another appointment. To such an officer a Compensation pension may be simultaneously awarded, subject always to the limitation prescribed by Article 514.

Acceptance of new Appointment.

440. If an officer who is entitled to Compensation pension accepts instead another appointment in the public service, and subsequently becomes again entitled to receive a pension of any class, the amount of such pension shall not be less than he could have claimed if he had not accepted the appointment.

SECTION III.—INVALID PENSION

441. An Invalid pension is awarded, on his retirement from the public service, to an officer who by bodily or mental infirmity is permanently incapacitated for the public service, or for the particular branch of it to which he belongs.

Rules regarding Medical Certificates.

442. If an officer applying for an Invalid pension is sixty years old or upwards, no certificate by a Medical Officer is necessary; it suffices for the head of the office to certify to the incapacity of the applicant. Otherwise incapacity for service must be established by a medical certificate attested as follows:—

(a) If the officer submitting it is on leave in England—by the Medical Board at the India Office

(b) If he is serving at or near the capital town of a Province—by the Administrative Medical Officer of the Province, or by a Medical Committee over which the Administrative Medical Officer should, when practicable, preside.

(c) If he is an officer in Superior service, and is serving in the interior of the country under such circumstances that, in the opinion of the authority which sanctions the pension, he can be conveniently required to appear before a Medical Invaliding Committee—by such Committee.

(d) In other cases, the authority which sanctions the pension may either accept a certificate given by a single Commissioned Medical Officer or Medical Officer in charge of a civil station, or assemble a special Invaliding Committee at a convenient civil station.

(e) If the pension applied for exceeds Rs. 100 a month, a certificate by a single Medical Officer should not be accepted as sufficient, if it is possible, without undue inconvenience, to assemble an Invaliding Committee or to cause the applicant to appear before the Director-General, Indian Medical Department, or the Standing Medical Committee at the Presidency.

(f) Except in the case of an officer on leave in England, no medical certificate of incapacity for service may be granted unless the applicant produces a letter to show that the head of his office or department is aware of his intention to appear before the Medical Officer. The Medical Officer shall also be supplied by the head of the office or department in which the applicant is employed, with a statement of what appears from official records to be the applicant's age. Where the applicant has a service book, the age there recorded should be reported.

443. (a) A succinct statement of the medical case, and of the treatment adopted, should, if possible, be appended.

(b) If the Examining Medical Officer, although unable to discover any specific disease in the officer, considers him incapacitated for further service by general debility while still under the age of fifty-five years, he should give detailed reasons for his opinion, and, if possible, a second medical opinion should always in such a case be obtained.

(c) In a case of this kind, special explanation will be expected from the head of the office or department of the grounds on which it is proposed to invalidate the officer.

444. A simple certificate that inefficiency is due to old age or natural decay from advancing years, is not sufficient in the case of an officer whose recorded age is less than fifty-five years, but a Medical Officer is at liberty, when certifying that the officer is incapacitated for further service by general debility, to state his reasons for believing the age to be understated. An officer's pension should not be reduced under Article 478 (a) on the ground of such a belief having been expressed unless it is clearly shown by the medical and other evidence that the age has been intentionally understated.—[See clauses (b) and (c) of the preceding Article.]

Form of Medical Certificate in England.

445. The form of the medical certificate given by the Medical Board attached to the India Office, respecting an officer applying for pension in England is as follows :—

" We have carefully examined Mr. _____

Taking into account all the facts of the case as well as his present condition, we consider that he is incapable of discharging the duties of his situation, and that such incapability is likely to be permanent. We therefore recommend that he be permitted to retire from the service of Government on the pension or gratuity for which he may be eligible."

446. If any doubt arises regarding the validity of a certificate by the Medical Board attached to the India Office, the Audit Officer must not of his own motion reject the certificate as invalid, but must submit the matter for the decision of the Local Government.

NOTE.—[The Local Government may delegate its power under this Article to Heads of Departments.]

Form of Medical Certificate in India.

447. (a) The form of the certificate to be given respecting an officer applying for pension in India is as follows :—

Certified that I (we) have carefully examined *A B*, son of *C D*, a _____
in the _____

His age is by his own statement _____ years, and by appearance about _____ years. I (we) consider *A B* to be completely and permanently incapacitated for further service of any kind [or in the Department to which he belongs] in consequence of (*here state disease or cause*). His incapacity does not appear to me (us) to have been caused by irregular or intemperate habits.

NOTE.—[If the incapacity is obviously the result of intemperance, substitute for the last sentence: "In my (our) opinion, his incapacity is the result of irregular or intemperate habits."]

(If the incapacity does not appear to be complete and permanent, the certificate should be modified accordingly and the following addition should be made:) I am (we are) of opinion that *A B* is fit for further service of a less laborious character than that which he has been doing [or may, after resting for ——— months, be fit for further service of a less laborious character than that which he has been doing].

(b) The object of the alternative certificate (of partial incapacity) is that an officer should, if possible, be employed even on lower pay, so that the expense of pensioning him may be avoided. If there be no means of employing him even on lower pay, then he may be admitted to pension; but it should be considered whether, in view of his capacity for partially earning a living, it is necessary to grant to him the full pension admissible under rule. The principle of Article 427 must always be carefully borne in mind.

Signallers in the Telegraph Department.

448. (a) In the case of Signallers in the Indian and Indo-European Telegraph Departments, the medical certificate prescribed by Article 447 may, if it is found after medical examination that it cannot be granted, be dispensed with in special cases when inefficiency is not the result of misconduct, and instead of it two certificates—

- (i) one in form A signed by two superior officers of the Telegraph Department; and
- (ii) the other in form B signed by the Director-General of Telegraphs—may be substituted.

FORM A. "We certify that, after a perusal of the records of *A B's* service and of the report of his immediate superior during the last twelve months of his service, we are satisfied that he is permanently incapacitated for the duties of a Signaller in the Telegraph Department."

FORM B. "After a careful consideration of *A B's* case, I concur with Messrs. *C* and *D* in thinking that he is permanently incapacitated for the duties of a Signaller in the Telegraph Department, and accordingly recommend that he may be permitted to retire on the pension or gratuity for which he may be found eligible."

(b) The practice enjoined in Articles 447 (b) and 453 of re-employing pensioners should be carefully followed as far as practicable in these cases.

(c) Officers permitted to retire under this Article may be granted a pension or gratuity of only four-fifths of the amount that would be admissible for a man permanently unfit for any duty.

NOTE.—[This Article applies only to men who are "Signallers," including in that term Telegraph Masters who are members of the signalling staff, when they retire.]

Special Precautions in the Police.

449. District Superintendents of Police should be on their guard against endeavours to retire on Invalid pension by officers who are capable of serving longer.

450. Medical Officers should confine themselves to recommending leave to such policemen as are not likely to benefit by a further stay in hospital, and should not certify that a policeman is incapacitated for further service unless they are officially requested to report upon his incapacity for further service.

451. Medical Officers should be specially searching in their examination of the physical unfitness of every applicant for pension, and, whenever the number of applicants for pensions is large, the examination should, if possible, be conducted by two Medical Officers.

Restrictions.

452. An officer discharged on other grounds has no claim under Article 441, even although he can produce medical evidence of incapacity for service.

453. Article 427 applies, *mutatis mutandis*, in the case of an officer invalided under Article 441 as unfit for employment only in some particular branch of the public service. Every effort should be made to find for such an officer other employment suited to his particular capacity.

454. If the incapacity is directly due to irregular or intemperate habits, no pension can be granted. If it has not been directly caused by such habits, but has been accelerated or aggravated by them, it will be for the authority by which the pension is grantable to decide what reduction should be made on this account.

Applicant to be discharged.

455. An officer who has submitted under Article 442 a medical certificate of incapacity for further service, must not (except for special reasons, to be reported to the Local Government) be retained in active service pending a decision on his application for pension, nor can he obtain leave of absence except Subsidiary leave preparatory to retirement.

Without the special orders of the authority which has power to sanction the pension, service after the date of such medical certificate does not count for pension.

456. The object of Article 455 is to discourage tentative applications; but an inferior servant (including in that term a Police officer whose pay does not exceed Rs. 20) who, in the opinion of the head of his office, is fit for light work may be retained in employment till his pension is sanctioned, provided that his place is not filled up till he retires, and that his service counts only to the date of his medical certificate.

457. Article 455 refers only to the retention in *active* service of an officer who has furnished a medical certificate in support of an application for Invalid pension or gratuity while in India. The retirement of an officer who is absent on leave other than Privilege leave, when such certificate is submitted, may have effect from the termination of his leave, and the officer may continue to draw leave allowance to the end of his leave

SECTION IV.—SUPERANNUATION PENSION.

458. A Superannuation pension is granted to an officer in superior service entitled or compelled, by rule, to retire at a particular age.

459. (a) An officer who has attained the age of 55 may be required to retire by the Local Government under which he is employed. The Local Government may delegate this power, in respect of a non-gazetted officer, to the authority which can fill up his appointment or can sanction his pension.

(b) The rule should be worked with discretion in order to avoid depriving the State of the valuable experience of really efficient officers and adding unnecessarily to the non-effective charges. In the case of officers holding superior appointments, the standard of efficiency by which retention is to be decided is above the standard required in lower appointments. In every case in which the rule is enforced the reasons for enforcing it should be recorded. But no claim from an officer to compensation on account of the enforcement of the rule will be entertained.

(c) Each such officer's case should be taken up when he is 55 years old and before the expiry of each extension of service. In every case the extension should be given for not more than one year at a time.

(d) An officer who has attained the age of 60 cannot be retained in the service of Government save in very exceptional circumstance, and with the sanction of the Local Government.

460. An officer, who is compelled to retire under the preceding Article, or who retires voluntarily under Article 461, and part of whose service has been Inferior, is entitled to pension on the same conditions as if he had been invalided under Article 481, and to the option allowed by Article 398.

Survey of India.

461. Officers of the Imperial and Provincial Services of the Survey of India cease to be in employ on attaining the age of 55 years, unless specially permitted by the Secretary of State, in the interests of the public service, to remain in the Department for a further definite period.

of State for information.

462. *Cancelled.*

Procedure.

463. With a view to the issue of necessary orders as to retention or otherwise of officers to whom Article 459 applies, the Audit Officer should on or about the 1st of September in each year, submit to the authorities concerned (*vide* Article 459 and Appendix No. 1) a list of those who will attain the age of 55, or complete the term for which extension has been allowed, during the next official year.

Optional Retirement at Fifty-five.

464. An officer in Superior service who has attained the age of 55 years may, at his option, retire on a Superannuation pension.

SECTION V.—RETIRING PENSION.

465. A Retiring pension is granted to an officer who voluntarily retires after completing qualifying Superior service for thirty years or such less time as may for any special class of officers be prescribed.

466. (*See Article 509A.*)

Combined Appointments.

save
partn

until he finally retires.

NOTE.—[The Government of India may delegate its power under this Article to minor Local Governments and Heads of Departments. A Provincial Government also may delegate its power to Heads of Departments.]

Chapter XIX.—Amount of Pensions.**SECTION I.—GENERAL RULES.**

468. The amount of pension that may be granted is determined by length of service as set forth in Articles 474 to 485. Fractions of a year are not taken into account in the calculation of any pension admissible to an officer under this part of these Regulations.

468A. Pensions fixed in rupees should be calculated to the nearest anna, that is, where the exact amount works out to six pies or more, it should be taken to the next higher anna, amounts below six pies being disregarded.

NOTE.—[This rule applies to all pensions granted under these Regulations.]

Currency.

469. A pension is fixed in rupees, and not in sterling money, even though it is to be paid in England.

Award of Full Pension.

470. (a) The full pension admissible under the rules is not to be given as a matter of course, or unless the service rendered has been really approved. (See Appendix 9.)

(b) If the service has not been thoroughly satisfactory, the authority sanctioning the pension should make such reduction in the amount as it thinks proper.

Limitations.

471. An officer entitled to pension may not take a gratuity instead of pension.

NOTE.—[See the note under Article 807.]

472. In the case of an officer who has any service under the Imperial (British) Government, pension from Indian Revenues should not be fixed until it has been ascertained whether any pension is payable from Imperial funds in respect of the service under the British Government.

473. An officer, not being a Military officer or a member of the Indian Civil Service, transferred to service under a Colonial Government, on final retirement from the Colonial service on pension or compensation allowance, receives, from Indian Revenues, for each completed year of qualifying and uninterrupted service in India, a pension of one-sixtieth of his average emoluments at the time of his transfer, such average emoluments to be calculated for the last three years, or, if the whole service in India is less than three years, for the whole period of service. The pension is subject to a maximum limit of Rs. 2,000 a year for an Indian service not exceeding ten years and Rs. 4,000 a year in any other case.

NOTE.—[The sanction of the Government of India is required to the transfer of an officer to any service of the description mentioned in this Article.]

SECTION II.—AMOUNT OF SUPERIOR PENSION.

474. The amount of a pension is regulated as follows:—

(a) After a service of less than ten years, a gratuity not exceeding (except in special cases, and under the orders of the Government of India) one month's emoluments for each completed year of service. If the emoluments of the officer have been reduced during the last three years of his service, otherwise than as a penalty, average emoluments may, at the discretion of the authority which has power to sanction the gratuity, be substituted for emoluments.

(b) After a service of not less than ten years a pension not exceeding the following amounts :—

Years of completed service.	Scale of pension.	Maximum limit of pension	
		Rs. a year, or	Rs. a month.
10	10 sixtieths of average emoluments	2,000	166½
11	11 " " "	2,200	183½
12	12 " " "	2,400	200
13	13 " " "	2,600	216½
14	14 " " "	2,800	233½
15	15 " " "	3,000	250
16	16 " " "	3,200	266½
17	17 " " "	3,400	283½
18	18 " " "	3,600	300
19	19 " " "	3,800	316½
20	20 " " "	4,000	333½
21	21 " " "	4,200	350
22	22 " " "	4,400	366½
23	23 " " "	4,600	383½
24	24 " " "	4,800	400
25 and above 30	25 " " "	5,000	416½

NOTE 1.—[For the precise meaning of average emoluments, see Articles 480 and 487.]

475. Officers holding any of the appointments enumerated below and belonging to what was formerly termed the Uncovenanted Service, may be allowed by the Local Government an additional pension of Rs. 1,000 a year, provided that they have rendered not less than three years of effective service (that is, service of the same nature as that which, under the provisions of Article 614, counts for the special pensions admissible under Article 612) in such appointment, and provided also that in each case during such service the officer has shown such special energy and efficiency as may be considered deserving of the concession. In the case of officers entering Government service after the 31st December 1909, the grant of the additional pension is subject to the further condition that they must, in the event of voluntary retirement, have completed, twenty-eight years of qualifying service. The same rule applies to officers of the Forest Department who entered Government service on or before the 31st December, 1909 (including those who were appointed on probation on or before that date), with the exception of those who have, at the time of their retirement, rendered three years' active service in appointments not below the first grade of Conservators. Voluntary retirement for the purpose of this rule should be taken as retirement under Articles 461 and 465.

REGISTRATION DEPARTMENT.—Inspectors-General under Local Governments, but not under Chief Commissionerships.

POLICE DEPARTMENT.—Inspectors-General and Deputy Inspectors-General under Local Governments and Administrations, and the Commissioners of Police, Calcutta, Madras, Rangoon and Bombay.

JAIL DEPARTMENT.—Inspectors-General under Local Governments, but not under Chief Commissionerships.

EDUCATION DEPARTMENT.—Directors of Public Instruction under Local Governments and Administrations.

ACCOUNTS DEPARTMENT (CIVIL).—

(a) Comptroller and Auditor General and Accountants General.

(b) (i) In the case of officers of the late Enrolled List now employed in the Indian Finance Department who have not elected the scale of pay sanctioned in the Secretary of State's Despatch No. 51-Financial, dated the 11th May, 1906—Deputy-

Comptroller General; Deputy Auditors General; Comptroller, India Treasuries; and Comptroller, Central Provinces.

- (u) In the case of other officers of the Indian Finance Department—Appointments in class I of that Department (including those in class I of the late Enrolled List and in class I of the late Superior Accounts Branch of the Public Works Department) *

* Mr. T. Ryan is subject to the special rule in Article 612 of these Regulations.

Accounts Department (Military)—Military Accountant General and Controllers of Military Accounts.

POSTS AND TELEGRAPHS.—Director General of Posts and Telegraphs, Chief Engineer, Telegraphs, Postmaster-General, Deputy Director-General of the Post Office, Director, Telegraph Engineering and Deputy Director-General, Telegraph Traffic.

AGRICULTURAL DEPARTMENT.—Agricultural Adviser to the Government of India.

FOREST DEPARTMENT.—Inspector-General of Forests, and Conservators.

ARCHAEOLOGICAL DEPARTMENT.—Director-General.

GEOLOGICAL SURVEY DEPARTMENT.—Director.

SURVEY DEPARTMENT.—Surveyor General and Superintendents of Circles.

METEOROLOGICAL DEPARTMENT.—Director-General of Observatories.

POLITICAL DEPARTMENT.—Officers of the rank of Resident in the graded list of the Political Department.

GENERAL ADMINISTRATION.—Commissioners of Divisions.

JUDICIAL DEPARTMENT.—Divisional Judges of the first grade in Burma.

CRIMINAL INTELLIGENCE DEPARTMENT.—Deputy Director of Criminal Intelligence.

LAND REVENUE DEPARTMENT.—Settlement Commissioner and Director of Land Records in Burma.

IMPERIAL CUSTOMS DEPARTMENT.—Collectors.

PRINTING, STATIONERY AND STAMPS DEPARTMENT.—Controller.

NOTE:—(See paragraph 133 for the form of notification in Form No. 98 (B) only.)

Service Regulations]

476. The following special scale of pension is admissible to officers appointed in England to the Forest and Geological Survey Departments:—

- (a) After a service of less than ten years, an invalid gratuity on the scale laid down in Article 474 (a).

- (b) After a service of not less than ten years, an invalid pension not exceeding the following amounts:—

Years of completed service.	Scale of pension	Maximum limit of pension.	
		Rs.	Rs.
10	20 sixtieths of average emoluments	1,000 a year or	83½ a month
11	21 " " "	1,400 " "	116½ "
12	22 " " "	1,800 " "	150 "
13	23 " " "	2,200 " "	183½ "
14	24 " " "	2,600 " "	216½ "
15	25 " " "	3,000 " "	250 "
16	26 " " "		
17	27 " " "		
18	28 " " "		
19	29 " " "		

in consequence of the absence of the permanent incumbent on leave without allowances, or on transfer to Foreign service. .

1 In the case of Section writers whose service has been allowed to count for pension under special orders of the Government of India, and of Press servants whose service qualifies under Article 380 "Emoluments" means the average earnings of the last six months of service. For calculating gratuity on the Superior scale, "Emoluments" means the average earnings of the last six months in Superior service, and for calculating pension on the Inferior scale, Pay means the average earnings of the last six months in Inferior service.

487. The term "Average Emoluments" means the average calculated upon the last three years of service.

be taken into account

2 If, during the last three years of his service, an officer has been absent from duty on leave without allowances (not counting for pension), or in inferior service, or suspended under such circumstances that the period of suspension does not count as service, the periods so passed should be disregarded in the calculation of the average, an equal period before the three years being included.

3. Excepting as provided in rules 1 and 2, only emoluments actually received can be included in the calculation. For example, when an officer is allowed to count time retrospectively

NOTE 1.—[This rule applies in the case of a Press servant remunerated by a fixed rate of pay if his pay is met from the grant for piece-work.]

NOTE 2.—[Overtime earnings of Press servants paid at piece-work rates may be taken into account in calculating Average Emoluments under this rule, but such earnings must be excluded in reckoning the Average Emoluments of Press employes who draw pay at fixed rates.]

NOTE 3.—[If during the last 72 months of his service a Press servant has been for some period on fixed pay and for other periods a piece-work employé, overtime earnings may be taken into account in calculating pension only for the periods during which he was remunerated at piece-work rates.]

Allowances which do not count.

488. An officer cannot count the following allowances.—

- (1) Local allowances, including allowances given for duties performed in addition to the work of a regular appointment;
- (2) Messing allowances, Working allowances, and Provision allowances to officers in the Marine Department;
- (3) House-rent allowance, or estimated value of free quarters;
- (4) Tour and other allowances (to officers who accompany the Viceroy or any Government);
- (5) Compensation for dearness of provisions.

PART IV.

Net Emoluments taken.

489. Any part of an officer's pay or emoluments, which is specially intended to provide for expenses incidental to his duty, must be excluded.

The following are examples of the operation of this Article :—

(1) When an officer's pay is intended partly to cover the expense of his providing or keeping a horse, his pay must be taken only at what it would be if it was not intended to cover such expense. When a water-carrier's pay includes provision for a bullock, his pay must be taken at what it would be if he were not required to keep a bullock.

(2) When a consolidated pay specially includes tentage, travelling allowance, or house allowance, these must be deducted.

(3) The commission paid to a Thugyi in Lower Burma goes in part to pay expenses incidental to his office. In calculating "Emoluments" or "Average Emoluments" for pension purposes, $2\frac{1}{2}$ per cent on a Thugyi's commission, if the average commission of the last three years of his service exceeds Rs. 600 a year, is deducted, as representing the expenses of his office; and pension is computed upon the remainder. No deduction is made if the average commission of a Thugyi for the last three years of service does not exceed Rs. 600 a year, in such cases the pension is computed upon the total amount of such average commission.

(4) When an officer's pay is fixed at two rates, a smaller rate during stationary duty and a higher rate during periods passed on tour or travelling, the former rate alone should be the basis of the calculation.

490. When service on temporary duty counts for pension under Article 376, the pay of the permanent appointment held by the officer, and not that drawn in respect of the temporary duty, is taken into consideration in determining the amount of pension.

491. The preceding Article does not apply to an officer deputed temporarily to service in the Income Tax Department, or to an officer deputed on abolition of his appointment to special duty (Article 379), or to an officer who, when his appointment was abolished, was on special duty. In these cases the full allowances are counted.

Combination of Appointments.

492. If an officer has held more than one appointment, in respect of each of which, if he had held it separately and alone, pension would have been admissible to him, the pension admissible to him is the sum of the several pensions which would have been admissible to him if he had held each office separately and alone. The consolidated pension thus admissible is subject to the limitations prescribed in Articles 474 to 480 and 481.

493. An officer is not entitled, for service in an office conjointly with another office, to any pension which would not have been admissible to him if he had held the office separately and alone.

Chapter XX.—Special Rules for the Police.

SECTION I.—EXTENT OF APPLICATION.

Government Police.

494. The rules in this Chapter apply to—

(1) Members of Police Forces constituted under Acts XIII of 1856, XXIV of 1859, and V of 1861 of the Governor-General of India in Council, Act IV of 1866 of the Lieutenant-Governor of Bengal in Council, and Acts VII of 1867 and I of 1872 of the Governor of Bombay in Council.

(2) The Trans-Indus Police Force, which was not organised under Act V of 1861 until the 4th August 1873, and never possessed a Superannuation Fund.

(3) Members of the Salt Preventive Force employed on the Northern Frontier line, at the Runn Salt Works in the Bombay Presidency and on the Salt Preventive Lines on the Goa and Daman frontiers, though the Forces to which they belong are not constituted under any Act of the Legislature, and never possessed a Superannuation Fund

(4) Members of the Police Force serving in the Baluchistan Agency, and sowars of the Somali Coast Mounted Police Force, although the Forces are not constituted under any Act of the Legislature.

Municipal Police.

495. (a) If the Police of a town are wholly supported by, and under the control of, a Municipality, the Government has no concern with their pensions.

(b) But if the Government, being interested in the efficiency of a Police Force, paid, wholly or partly, by a Municipality, the Calcutta Port Trust, or from Cantonment Funds, or from the General Revenues subsidised by a contribution from a Municipality, the Calcutta Port Trust, or from Cantonment Funds, undertakes the organisation and control of the Force, as connected with and auxiliary to the Civil Constabulary, service in such a Force qualifies. The contributions of Municipalities, the Calcutta Port Trust, or of Cantonment Funds towards the cost of the pensions of such Forces are, for the present, undetermined.

496. The Police Force in the Presidency towns of Calcutta, Madras, and Bombay, and in the Municipalities in Lower Bengal, come under clause (b) of the preceding Article.

497. *Omitted.*

Railway Police.

498. The service of members of the Railway Police, appointed and controlled by Government, qualifies, though they may be either wholly or partly paid by the Railway Companies.

SECTION II.—QUALIFYING SERVICE.

499. Service in any of the Police Forces mentioned in Article 494, after the establishment of a Superannuation Fund in the Force, qualifies.

of the ordinary pension rules

1905.

In the Police Forces of which the Superannuation Funds were abolished the pay of the

of receiving back their subscriptions and coming under the ordinary pension rules, or of continuing their subscriptions and eventually receiving pensions under the special rules for the Police"—[Finance Department to Bombay, No 1051 D, dated 23rd June 1876.]

500. Men of the Police Force of the Cities of Bombay and Calcutta who have served the full time for pension in the Force and who joined the Force before the 1st April 1886 and 27th December 1905, the respective dates of the abolition of the Superannuation Funds, are, on being invalided, admitted to the benefits of the Superannuation Fund on paying up their subscriptions for the full period of their service. Under this rule the service of an officer in the Bombay and Calcutta City Police before the establishment of the Superannuation Fund counts towards pension under the rules of the Funds if he pays up his subscriptions for the whole period of his service in the Police Force.

Service before Enlistment.

501. In the following cases service rendered before enlistment in the present Police Constabulary qualifies :—

(a) Soldiers transferred to the Police on reduction of the Native Army count their Army service.

1 This concession does not apply to a soldier voluntarily taking his discharge from the Army and entering the Police, except as to soldiers who, under the authority of the order in the Military Department, No. 526 E. S., dated the 25th October 1880, volunteered for service in the Port Blair Police.

(b) Service in Superior grades in any other Department qualifies.

(c) Service in the Bombay Excise (Abkari) Police, before that Force was amalgamated with the Bombay District Police, qualifies.

(d) Native Commissioned officers and men of the Army who volunteer for transfer to the levies and Military Police raised in Burma, in consequence of the annexation of Upper Burma, are allowed to count their Army service for pension under the rules applicable to the Police in that Province.

(e) A subadar or jemadar of the Bengal or Assam Military Police, recruited from the Army or from a local corps, and Native Officers and men of the Dera Ghazi Khan Border Military Police recruited from the Army count service as follows:—

(i) A man recruited from the Army will be eligible for pension under the civil rules (counting both his past Military and Police service) on completion of ten years' service in the Military Police. If he retires with less than ten years' service in the Police, he will be granted pension on the Military scale according to his rank for the whole period of his service including service in the Police.

(ii) A man recruited from a local corps may count half his service in such corps towards Civil pension.

NOTE.—[Pensions granted to men who count Army service under the foregoing rules are, if their Military service was sufficient to entitle them to pension if discharged without fault, a Military charge; otherwise they are a Civil charge.]

Breaks in Service.

502. Subject to the provisions of Chapter XXI, a policeman on pay not exceeding twenty rupees, who re-enlists within one year, after discharge or resignation, may, with the sanction of the authority who sanctions the pension or of the Inspector-General of Police, count his service before such discharge or resignation.

SECTION III.—AMOUNT OF PENSION.

Officers on pay not exceeding Rs. 20.

503. The pension admissible to an officer, whose pay at date of discharge or resignation does not exceed twenty rupees, will be determined as prescribed in Article 505, according to one of the following scales:—

Scale A.—According to the rules of the Superannuation Fund of the Force

1. As the rules of the Superannuation Fund did not always provide for Compensation pension, the following orders were issued with reference to the reductions directed in 1899:—

(1) Compensation pension should be awarded at the same rate as the Superannuation Fund Rules provide for Invalid pensions.

PART IV.

(2) But if a gratuity thus awardable is less than the amount (without interest) of the officer's subscription to the Fund, the difference should be made up.

Scale B.—According to the rules prescribed in Chapters XVII to XIX for the calculation of pensions for Superior service; except that all service in the Police after the age of eighteen years qualifies

NOTE.—[Policemen in the lower ranks of the Madras City Police, on salaries not exceeding Rs. 20 a month, who enlisted after the 19th July 1871, may retire on pension without medical certificate after twenty-five years' service.]

504. (a) The pension of an officer of the Town Police of Calcutta who was in the Force before the 27th December 1905, and of an officer of the Town Police of Bombay who was in the Force before the 1st April 1886, is regulated by Scale A.

(b) The pension of an officer of the Town Police of Bombay, if he was enlisted or re-enlisted on or after 1st April 1886, is regulated by Scale B

505. The pension of an officer of any other Force is regulated as follows:—

(a) If he was in the Police before the 19th July 1871 and has served continuously since that date, by Scale A or Scale B according to his election.

(b) If he was enlisted or re-enlisted on or after the 19th July 1871, by Scale B.

(c) The pension of an officer enlisted in the Calcutta or Suburban Police Force on or after 27th December 1905 is regulated by Scale B. The pension of an officer who was enlisted before 27th December 1905 and subscribed to the Police Superannuation Fund, and whose pay at the date of discharge does not exceed Rs. 20, is, on his being invalided regulated by Scale A, provided he pays up his subscriptions from the 27th December 1905 to the date of his retirement. Failing such payments his pension or gratuity is regulated by Scale B.

Officers on pay exceeding Rs. 20.

506. The pension admissible to an officer whose resignation exceeds twenty to ordinary service, except that

a month.

1. When a Police officer, by promotion to a pay exceeding twenty rupees, loses any benefit as to pension which he would have enjoyed had his pay remained unchanged, his pension may be regulated as if he had not received the promotion

2. Men of the Bombay City Police count as Superior their service in the Force in inferior grades before the establishment of the Superannuation Fund

Previous Inferior Service.

507. If part of an officer's continuous service qualifies for pension under the general rules, but does not qualify under the rules in this Chapter,

his former service will not count for future pension, or refund it and count his former service.

512. The intention to refund must be stated immediately on re-employment; but the refund may be made by monthly instalments of not less than one-third of the officer's salary, and also not less than the whole gratuity divided by the number of months which have elapsed since the end of the service for which the gratuity was given. The right to count previous service does not revive till the whole amount is refunded.

NOTE 1.—[The intention of this rule is to be stated immediately on re-employment.]

513. (See 510A.)

After Compensation Pension.

514. (a) An officer who has obtained a Compensation pension, if re-employed, may retain his pension in addition to his pay: provided that, if he is re-employed in a post paid from General Revenues, the pension shall remain wholly or partly in abeyance, if the sum of the pension and the pay on re-employment exceeds the pay of the appointment on abolition of which the pension was given; that is to say, an officer can draw so much pension only as will make his total present pay and pension equal to the pay he drew at the time of his retirement. In the case, however, of a pensioner re-employed, in either a permanent or temporary appointment, for *bonâ fide* temporary duty lasting for not more than a year, the Local Government or, in cases where the pension does not exceed Rs. 10 a month, the officer who controls the establishment on which the pensioner is to be employed, may allow pension to be drawn in whole or in part, even though the sum total of pay and pension exceeds the pay which the officer drew on retirement.

NOTE 1.—[This rule applies to the re-employment on all establishments paid from the General Revenues, whether paid by fixed salary or by fluctuating monthly allowances; but it does not apply to pensioners employed on work as coolies and paid daily hire.]

NOTE 2.—[In the case of re-employment under a Local Fund, no deduction is made from a compensation pension.]

NOTE 3.—[The Local Government may delegate its power under this Article to Heads of Departments in respect of pensioners whose re-employment they are authorized to order.]

NOTE 4.—[The Local Government may delegate its power under this Article to Heads of Departments in respect of pensioners whose re-employment they are authorized to order.]

NOTE 5.—[The restrictions in this Article do not apply to ex-policemen whose pension does not exceed Rs. 10 a month or to ex-inferior servants.]

(b) If his re-employment is in qualifying service, he may either retain his pension (subject to the proviso above stated), in which case his former service will not count for future pension, or cease to draw any part of his pension and count his previous service. Pension immediately ~~drawn~~ need not be refunded.

NOTE.—[An officer counts his previous service under clause (b) if on re-employment his pension remains wholly in abeyance under the proviso to clause (a)]

515. In the case of a Section-writer whose service has been allowed to qualify for pension under special orders of the Government of India, or of a press servant (see *Article 380*) re-employed, the pay of the appointment abolished is taken at the average earnings of the last six months of employment.

516. If an officer does not, within three months from the date of his re-employment, exercise the option conceded by *Article 514*, of ceasing to draw pension and counting his former service, he may not thereafter do so without the permission of the Local Government.

517. An officer who, under *Article 514*, draws pension in addition to pay shall, if he is re-employed, draw so much of his pension as will leave up to the amount which would have been taken leave of the same kind under the same circumstances while holding his abolished appointment. Provided that his allowances on leave shall never be less than his pension.

518. Cancelled

After Invalid Pension.

519. There is no bar to the re-employment of an officer who has regained health after obtaining Invalid pension, or if an officer is invalided as being incapacitated for employment in a particular branch of the service, to his re-employment in some other branch of the Service. The rules in such a case as to refunding gratuity, drawing pension, and counting service, are the same as in the case of re-employment after Compensation pension.

After Superannuation or Retiring Pension.

520. An officer who is in receipt of a superannuation or retiring pension shall not be re-employed or continue to be employed in service paid from general revenues or from a local fund, except on public grounds. Sanction to re-employment or extension of the term of employment may be given as follows :—

- (i) By the Government of India in the Administrative Department concerned, when the pensioner served before retirement in a gazetted appointment directly under the Government of India or belonged to an Imperial Service or Imperial Branch of any Service, or was a Statutory Civilian or other officer who, before retirement, held a post usually filled by officers of an Imperial Service or Branch ;
- (ii) In other cases, by the Local Government under whose administration the pensioner is re-employed ;
- (iii) By any authority subordinate to a Local Government to whom the Local Government may delegate its powers under this Article in respect of pensioners re-employed in establishments under the control of such authority.

521. The authority competent to fix the pay and allowances of the appointment in which the pensioner is employed shall determine whether his pension shall be held wholly or partly in abeyance. If the pension is drawn wholly or in part, such authority shall take the fact into account in fixing the pay to be allowed to him; provided that (i) where a Local Government has delegated its power under clause (iii) of Article 520 to the Head of a Department, the latter may not allow the pensioner to draw full pension in addition to the full pay of the post except when the re-employment or continued employment is for *bonâfide* temporary duty lasting for not more than a year or the pension does not exceed Rs. 10 a month, and (ii) where the Local Government has delegated its power to any other authority subordinate to itself, such authority may not allow the pensioner to draw in full a pension of more than Rs. 10 a month in addition to the full pay of the post.

NOTE — [The restrictions in this Article do not apply to ex policemen whose pension does not exceed Rs. 10 a month, or to ex inferior servants.]

Exceptions.

522. The foregoing rules do not apply—

- (i) to a pension paid from a Police Superannuation Fund constituted by contributions from the Force. Such a pension may be drawn, without restriction, in addition to salary; or
- (ii) to pensioners re-employed in non-pensionable service on the subordinate establishment of a State Railway. Such pensioners retain their gratuities and continue to draw their pensions, subject, in the case of pensions of all classes, to the provisions of Article 514; or
- (iii) to pensioners re-employed under the Court of Wards.

523. A pensioner of any class may be employed as an Extra Departmental Agent in the Post Office, or as a Sub-Registrar under the law for the registration of documents, remunerated by fees only.

524. *Cancelled.*

Employment on the Railway Board.

524-A. When an officer who is in receipt of a pension from Indian revenues is appointed President or Member of the Railway Board, he shall be allowed to draw his pension in addition to salary. If, however, an officer still in active service is so appointed, he will be ineligible for admission to pension during his tenure of office on the Board.

SECTION III.—MILITARY PENSIONERS.

525. (a) Except where it is otherwise expressly stated (see Article 509A), the foregoing rules do not apply to a Military pensioner in Civil employ.

NOTE.—[An officer counts his previous service under clause (b) if on re-employment his pension remains wholly in abeyance under the proviso to clause (a)]

515. In the case of a Section-writer whose service has been allowed to qualify for pension under special orders of the Government of India, or of a press servant (*see Article 380*) re-employed, the pay of the appointment abolished is taken at the average earnings of the last six months of employment.

516. If an officer does not, within three months from the date of his re-employment, exercise the option conceded by Article 514, of ceasing to draw pension and counting his former service, he may not thereafter do so without the permission of the Local Government.

517. An officer who, under Article 514, draws pension in addition to pay shall, as will have | so much of his pension he amount which would f the same kind under the same circumstances while holding his abolished appointment: Provided that his allowances on leave shall never be less than his pension.

518. *Cancelled.*

After Invalid Pension.

519. There is no bar to the re-employment of an officer who has regained health after obtaining Invalid pension, or if an officer is invalided as being incapacitated for employment in a particular branch of the service, to his re-employment in some other branch of the Service. The rules in such a case as to refunding gratuity, drawing pension, and counting service, are the same as in the case of re-employment after Compensation pension.

After Superannuation or Retiring Pension.

520. An officer who is in receipt of a superannuation or retiring pension shall not be re-employed or continue to be employed in service paid from general revenues or from a local fund, except on public grounds. Sanction to re-employment or extension of the term of employment may be given as follows :—

- (i) By the Government of India in the Administrative Department concerned, when the pensioner served before retirement in a gazetted appointment directly under the Government of India or belonged to an Imperial Service or Imperial Branch of any Service, or was a Statutory Civilian or other officer who, before retirement, held a post usually filled by officers of an Imperial Service or Branch ;
- (ii) In other cases, by the Local Government under whose administration the pensioner is re-employed ;
- (iii) By any authority subordinate to a Local Government to whom the Local Government may delegate its powers under this Article in respect of pensioners re-employed in establishments under the control of such authority.

Add the following as note 1 under article 521, numbering the existing note as note 2 :—

NOTE.—[Where the employment is in service paid from a local fund, the authority determining whether the pension shall be wholly or partly held in abeyance shall be either—

- (i) the authority administering the local fund, if so empowered by the Local Government by special or general orders in this behalf; or,
- (ii) in any other case, the Local Government or such other authority as the Local Government may prescribe.]

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for the earlier service has not been refunded, any be) may be allowed for the subsequent amount of such gratuity or the present value of such gratuity according to Table A in Appendix 10, plus the amount of gratuity which shall not exceed the amount of gratuity which that would have been admissible had the earlier service been refunded.

Gratuity or the present value of such pension, gratuity, exceed the amount of gratuity or that would have been admissible if the earlier service had been refunded, the excess must be

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PART V.—RULES APPLICABLE TO SPECIAL DEPARTMENTS OR SPECIAL OFFICERS.

Chapter XXII.—The Governor-General, Governors, Lieutenant-Governors and Members of Council.

SECTION I.—EXISTING PENSIONS HOW AFFECTED.

532. The following is the Statute Law applicable to the Governor-General, Governors, and Members of Council who hold or enjoy pensions :—

"The following is the Statute Law applicable to the Governor-General, Governors, and Members of Council who hold or enjoy pensions :—

"(3) (a) If any Governor-General, Governor, or Member of Council is entitled to a pension or annuity payable out of the Civil or Military Fund, the salary of his office of Member of Council is to be reduced under Acts 3 and 4 Will. IV, Cap. 85, s. 77, by the amount of the pension or annuity held by him. A Good Service Pension enjoyed by Military Officers comes within the meaning of pension under the Act cited above.

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NOTE.—[The audit officer concerned should, in each case, obtain from each of the officials mentioned in the above rule, when he assumes charge of his post, a statement as to whether he is in receipt of any pension, or other payment, on account of which his salary is required to be reduced under this Article.]

533. If any Ordinary Member of Council hold or enjoy any pension or any annuity payable out of the Civil or Military Fund, the salary of his office of Member of Council is to be reduced under Acts 3 and 4 Will. IV, Cap. 85, s. 77, by the amount of the pension or annuity held by him. A Good Service Pension enjoyed by Military Officers comes within the meaning of pension under the Act cited above.

SECTION II.—LIEUTENANT-GOVERNORS.

Leave Rules.

534. (a) Leave on Medical Certificate for not more than six months may be granted to a Lieutenant-Governor. On resuming his duties after such leave, a Lieutenant-Governor is entitled to half his salary for the period of his absence. If he is prevented from resuming his duties, he is entitled to no absentee allowances.

(b) A Lieutenant-Governor is not entitled to any other leave.

NOTE 1.—[Service as a Lieutenant-Governor does not qualify for any leave under the ordinary rules, but counts as continuous service for the purpose of Article 303 and does not interrupt any leave previously earned.]

NOTE 2.—[The provisions of Article 215 do not apply to a member of the Indian Civil Service who on resigning the office of Lieutenant-Governor takes furlough or special leave

under the ordinary rules. If he resigns preparatory to retirement he is entitled to subsidiary leave on half average salary.]

NOTE 3.—[A Lieutenant-Governor who is granted leave during the term of his office is required to conform to the rule—Article 224 of these Regulations—as regards obtaining a certificate of fitness to return to duty.]

Asting Lieutenant-Governor.

535. The salary of a person appointed to officiate as Lieutenant-Governor is regulated in the same way as the salary of a person appointed to be temporary Member of Council (see Article 539).

SECTION III.—MEMBERS OF COUNCIL.

Tenure of Office.

536. The tenure by a Member of Council of his office begins from the date on which he first takes upon himself the execution of his office whether as a temporary Member appointed in India, or after the issue of His Majesty's warrant of appointment; and the resignation of his office, by a Member of Council, whose successor has not entered upon his office, takes effect from the day following that of his embarkation at any port in India, excluding Aden, or from the expiry of his five years' tenure of office, whichever date is earlier. Any time during which a Member of Council (not being himself granted leave) draws less than full pay shall not be computed as part of his five years' tenure of office.

Leave Rules.

537. The leave admissible to an Ordinary Member of the Executive Council of the Governor-General or of the Governor of Madras or Bombay or Bengal or of the Lieutenant-Governor of any Province is regulated by Statute 24 and 25 Vict., Cap. 67, s. 26, as follows:—

six months, his office shall be vacated.

NOTE 1.—[Service as a Member of Council does not qualify for any leave under the ordinary rules, but counts as continuous service for the purpose of Article 308 and does not interrupt any leave previously earned.]

NOTE 2.—[The provisions of Article 215 do not apply to a Member of the Indian Civil Service who on resigning the office of Member of Council takes furlough or special leave under the ordinary rules. If he resigns preparatory to retirement he is entitled to subsidiary leave on half average salary.]

NOTE 3.—[A Member of Council who is granted leave during the term of his office is required to conform to the rule—Article 224 of these Regulations—as regards obtaining a certificate of fitness to return to duty.]

538. Subject to any special orders by the Government of India to the contrary, leave of absence granted to an Ordinary Member of the Council

of the Governor-General (if taken out of India) commences on the day after such Member embarks at any port in India, excluding India, and ends on the day before he disembarks at Provided always that such Member has of his office until he embarks, and that he resumes charge immediately upon his disembarkation.

Temporary Member.

539. The salary and the appointment of a temporary Member of the Executive Council of the Governor-General or of the Governor of Madras or Bombay or Bengal, or of the Lieutenant-Governor of any Province is regulated by Statute 24 and 25 Vict., Cap. 67, s. 27, as follows :—

NOTE.—[The headings which are introduced to facilitate reference are not a part of the Statute.]

In case of vacancy.

emoluments and advantages appertaining to the said office during his continuance therein, every such temporary Member of Council foregoing all salaries and allowances by him held and enjoyed at the time of his being appointed to such office

In case of absence.

if he hold any such office, the remaining half of such last named salary being at the disposal of the Government of India, or other Government as aforesaid.

Provido.

Provided always that no person shall be appointed a temporary Member of the said Council who might not have been appointed as hereinbefore provided to fill the vacancy supplied by such temporary appointment.

540. A Good Service pension comes within the "allowances" which a provisional Member of Council appointed on a vacancy occurring in the office of an Ordinary Member must forego.

541. The salary of the substantive office of a temporary Member of Council appointed in the place of an Ordinary Member of Council who, by reasons of infirmity or otherwise, is rendered incapable of acting or is absent on leave, includes the Military pay or Indian Army pay of an officer holding an appoint-

ment the pay of which is a Staff salary but does not include a Good Service pension. Such a temporary Member is not liable to any deduction of salary on account of Good Service pension.

542. A public officer nominated to be an Additional Member of the Imperial Legislative Council shall receive while on deputation with the Council the pay or salary which he would have drawn from time to time if he had not been so deputed. He is, in addition, entitled to draw the allowances admissible under Article 1148.

Pension Rules.

542A. A Member of the Executive Council of the Governor-General or of a Local Government, who, before appointment as such, held an appointment in which service qualifies for pension under Article 474, is entitled to count as additional service qualifying for such pension all service which, under Article 536, counts as part of his five years' tenure of office as Member of Council (including leave under Article 537) and also all service as temporary Member under Article 539. He also enjoys the advantage of the two following conditions, *viz.* —

(1) On retirement after five years of such service he is entitled :—

(a) to pension on the scale given in Article 474, even if he does not retire on medical certificate and has not attained the age, or rendered the full period of total service, which would have been necessary, had he retained his previous appointment, to render him eligible for superannuation or retiring pension; and

(b) to an additional pension of Rs1,000 a year.

(2) On retiring on account of certified ill-health after not less than three years' additional service as defined in the earlier part of this Article he is entitled to a pension of Rs1,000 a year in addition to his invalid pension calculated on the scale in Article 474.

542B. A Member of the Executive Council of the Governor-General or

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pension under the following rules :—

(1) *Qualifying Service.*—The periods of service qualifying for pension are—

(a) All service in any of the judicial offices abovementioned, which, but for the officer's appointment to a Membership of Council, would have counted as qualifying service for a judicial pension.

(b) All service as Member of Council which under Article 536 counts as part of the Member's five years' tenure of office (including leave under Article 537), and also all service as temporary Member under Article 539.

- (c) A special addition of $2\frac{1}{2}$ years which shall be made if the service counting under clause (b) of this rule is not less than five years.
- (2) *Conditions of Grant of Pension.*—Pension will be granted on retirement after five years' service as Member of Council as defined in clause (b) of rule 1, or on retirement on account of certified ill-health after less than five years' service as Member of Council, provided that in the latter case the qualifying service is not less than $6\frac{1}{2}$ years.
- (3) *Amount of Pension*—(a) On retirement after $11\frac{1}{2}$ years of qualifying service the pension will be as follows:—
- | | |
|--|--|
| (i) For a Member of Council who before his appointment was Chief Justice of a High Court and whose periods of service as Chief Justice and Member of Council [excluding the $2\frac{1}{2}$ years added under 1 (c) above] were not less than 5 years 9 months | 1,800 <i>l.</i> if the Member was previously Chief Justice of the High Court at Calcutta
1,500 <i>l.</i> if he was previously Chief Justice of the High Court at Madras or Bombay, or for the North-Western Provinces.* |
| (ii) For a Member of Council who before his appointment was Chief Justice of the High Court, but whose periods of service as Member of Council and Chief Justice [excluding the $2\frac{1}{2}$ years added under 1 (c) above] were less than 5 years 9 months; and for a Member of Council who before his appointment was Puisne Judge of a High Court | 1,200 |
| (iii) For a Member of Council who before his appointment was Chief Judge or Judge of a Chief Court | 1,000 |
| Judicial Commissioner or Additional Judicial Commissioner | 750 |
- (b) On retirement after qualifying service of less than $11\frac{1}{2}$ years, but in circumstances entitling the Member to pension under rule 2, the pension will be of half the amount granted under clause (a) of this rule.

542C. 1. If a Member of the Executive Council of the Governor-General or of a Provincial Executive Council was holding, at the time of appointment, a public office as defined in Section 4 of the Superannuation Act, 1892† (other than an office in India), his service as Member of Council qualifies under the rules in this article for the grant from Indian revenues of pension, gratuity, or other retiring allowance (including the allowance admissible to legal personal representatives under 9 Edward 7, c. 10).

2. *Period of Qualifying Service.*—The period of service qualifying for such grant is from the date of taking up the appointment of Member of Council to the date of resigning it, with the addition of such intervals (not exceeding

* United Provinces of Agra and Oudh.

† 55 and 56 Vict., c. 40.

30 days in either case) as may occur between giving up another public office and taking up the appointment of Member of Council and between resigning that appointment and taking up another public office.

3. *Conditions of Grant*.—A Member of Council becomes eligible for a grant if he retires:—

- A. On completing the customary term of his appointment or on attaining the age of 60 or at any time thereafter; or
- B. On account of ill-health certified by a medical certificate of such a nature as appears to the Secretary of State in Council to justify a grant; or within six months of completing the customary term of his appointment for reasons of administrative convenience approved by the Secretary of State for India in Council; or
- C. On transfer to another public office after holding which he retires, either immediately or after subsequent transfer to other public office or offices, in circumstances rendering him eligible for pension, gratuity, or other retiring allowance in respect of the office held before appointment as Member of Council.

4. *Time at which Pension, Gratuity or other Retiring Allowance becomes payable*.—Any grant admissible under these rules is made:—

- A. *If the Member of Council retires from that office otherwise than on transfer to another public office*:—From the date of such retirement.
- B. *If he retires on transfer to another public office*:—From the date on which the pension, gratuity, or other retiring allowance in respect of the public office held before appointment as Member of Council becomes payable in accordance with any Act of Parliament or rules made by the Treasury in pursuance thereof.

5. *Amount of Grant*.—The grant from Indian revenues is made in accordance with the rules framed by the Treasury under Section 7 (1) of the Superannuation Act, * 1909, subject to the condition that, for the purpose of calculating the apportionment of the total award therein mentioned and the amount of such award when it is dependent on the salary of the Member of Council and the rules applicable to him in respect of that appointment, the Member of Council is assumed to have been, during the tenure of that appointment:—

- (a) In receipt of salary at the rate last drawn by him in his previous public office;
- (b) Under the same regulations regarding superannuation (including gratuity admissible to legal representatives) as were last applicable to him in such office, except as regards the conditions of grant (which are governed by Rule 3 above) and the time at which pension, gratuity, or other retiring allowance becomes payable (which is governed by Rule 4 above).^{*}

6. *Reduction, Suspension, or Withdrawal of Grant.*—Any grant made under these rules is subject to reduction or suspension under 4 & 5 William IV, c. 26, s. 20, to withdrawal under 22 Victoria, c. 26, s. 11, and generally to the operation of any statute of similar effect; any reduction of a total award, of which a grant under these rules forms part, being applied proportionately.

Chapter XXIII.—Judges of the High Courts.

Statutory Rules.

543. The following rules made, under Statutes 24 and 25 Vict., c. 104, s. 6 and 5 and II Geo. 5, c. 61, s. 101, by the Secretary of State in Council of India, regulate the salaries, allowances, furloughs, retiring pensions, and (when necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts established under the said Statutes. They have effect from the 25th day of April 1899, except in so far as they refer to the Chief Justice and Judges of the High Court at Patna, the rules in their case having effect from the date of establishment of that Court.

N.B.—[The headings (other than those of sections) which are introduced to facilitate reference do not appear in the Statutory rules.]

Definitions.

1. In these rules, unless there is something repugnant in the subject or context,—

“Acting Chief Justice” means a Judge appointed under Section 7 of Statutes 24 and 25 Vict., Cap. 104, to perform the duties of Chief Justice of a High Court.

“Acting Judge” means a person appointed under the said Section 7 to perform the duties of a Judge of a High Court.

“Temporary Additional Judge” means a person appointed under Section 3 of the Statutes 1 and 2 Geo. V, Cap. 18, to perform the duties of a Judge of a High Court.

“Judge” includes a Chief Justice and Acting Chief Justice, and an Acting Judge and a Temporary Additional Judge, except where the contrary is expressed.

“Actual Service” includes —

- (a) Time spent by a Judge on duty as Judge, or in the performance of such other functions as he may be directed to discharge by the Governor-General of India in Council;
- (b) Time spent by a Judge on privilege or subsidiary leave;
- (c) Duly authorised vacations (provided that the Judge is not absent on furlough or on extraordinary leave under Rule 26).

Section I.—Salaries.

2. The Chief Justice, or Acting Chief Justice, of the High Court at Calcutta, shall be paid a salary at the rate of Rs. 72,000 per annum.

3. The Chief Justice, or acting Chief Justice, of the High Courts at Madras, Bombay, Allahabad and Patna respectively, shall be paid a salary at the rate of Rs. 60,000 per annum.

4. A Judge, or acting Judge, of the High Courts at Calcutta, Madras, Bombay, Allahabad and Patna respectively, shall be paid a salary at the rate of Rs. 48,000 per annum.

5. Every Chief Justice, or Acting Chief Justice, and every Judge, or Acting Judge, shall be allowed to draw, in addition to his salary, any exchange compensation allowance which may be sanctioned for public servants generally, subject always to the conditions and limitations prescribed in the rules relating to such allowance.

*Section II.—Leave.**Furlough earned.*

6. One year's furlough shall be placed to the credit of each Judge after the completion of the fourth, eighth and twelfth years of service. The total of all furlough not exceed three years' actual service. Furlough shall be taken at any time.

Furlough admissible.

7. Except under Rules 9 and 10, no furlough shall be granted until at credit under Rule 6. But any Judge already in the service of the Government at the time of being appointed to the High Court, who, when so appointed, had at his credit under the rules in force at the time, the branch of furlough granted for furlough shall be taken at any time.

Conditions of grant.

8. Except under Rules 9 and 10, furlough shall not be granted until after the completion of three years' actual service from the date of the last return from furlough or from extraordinary leave.

9. Under medical certificate, furlough may be granted before it is at credit under Rule 6 and although three years' actual service may not have been completed since the last return from furlough or from extraordinary leave.

9A. A Judge on long leave in Europe must, if the leave was granted or has been extended, furnish a certificate or not, satisfy the Government. Ordinarily he must furnish a medical certificate in a form to be prescribed by the Government. On the required evidence of fitness being furnished, the Judge will receive from the India Office permission to return to India.

10. On urgent private affairs, furlough may be granted to a Judge before it is at credit under Rule 6, and although three years of actual service have not been completed since the last return from furlough or extraordinary leave: Provided that furlough under this rule shall not exceed six months, and shall be granted only once during the whole period of a Judge's service.

Commencement and end of Furlough.

11. Furlough taken in India shall be reckoned from the date on which the Judge quits his office to the date of his resuming duty. Furlough taken out of India shall be reckoned from the date of embarkation at the port of departure from India to the date of debarkation on return to India, except in a case falling under Rule 24.

12. If furlough be taken partly in India and partly out of India, the commencement and termination of the furlough shall be respectively determined under the provisions of Rule 11 according as the furlough begins or ends in or out of India.

Subsidiary Leave.

13. For the interval between the date of quitting his office and the commencement of furlough out of India, and between the termination of furlough out of India and resuming his office, a Judge may be allowed a subsidiary leave not ordinarily exceeding thirty days, which in special cases may be extended.

Leave Allowances.

14. A Judge when on furlough shall be entitled to a leave allowance of 100 per cent of his salary. If the Judge is on furlough for more than six months, the allowance shall be 120 per cent of his salary.

Number of Furloughs admissible.

with whom rests the question of granting the furlough.

16. Applications for furlough not supported by medical certificate shall be granted usually in the following order:—

Privilege Leave—Present Rules.

(b) Once in three years, and not oftener, privilege leave may be granted or added to the vacation.

18. *Omitted*

Privilege Leave Declaration

must be accompanied by an explanation of the special circumstances under which it is made, and it shall be in the absolute discretion of the Government to grant or withhold the permission sought.

Combination of Leave.

20 *Privilege leave may be prefixed but not affixed to furlough This rule as to have effect from the 25th of January 1901.*

Applications for Leave.

21. Applications for leave shall in all cases be submitted in such manner as the Government shall from time to time prescribe.

Payment of Leave Allowances

22. Leave allowances shall be payable monthly if payment is made in India, and quarterly if in England*

Effect of Leave on Substantive Appointment, etc.

23. No substantive appointment shall be vacated merely by reason of leave being granted under the rules.

24. If a Judge overstays any leave, he shall forfeit all salary during the time of his remaining so absent; and if he overstays his leave for more than one week, his office shall be liable

* Leave allowance is now paid monthly in arrear if payment is made in England

to be declared vacant. But a Judge on leave (other than leave under Rule 17) is not obliged to return to duty on an authorized holiday, unless another officer is officiating as Judge in consequence of his absence.

A Judge may be allowed to combine vacation on full pay with leave as shown in (A) and (B) below, provided that no acting allowance is sanctioned or additional expense is incurred by the State in consequence of his absence during the vacation:—

- (A) Where the vacation of the High Court consists of one period, a Judge may be allowed to combine vacation on full pay with leave, either at the beginning or end thereof, but not both.
- (B) Where the annual long vacation is not continuous, but is divided into two separate portions, a Judge may be allowed either—
 - (a) to combine one part of a vacation on full pay with leave, either at the beginning or end thereof, but not both; or
 - (b) to combine both parts of one annual vacation on full pay with leave for the intervening period.

Effect of Leave on Pensionary Service.

25. No leave except privilege leave and leave subsidiary to furlough shall count as service for pension.

Extraordinary Leave.

26. If
to grant to
going rules
leave exceed
service

Section III.—Pensions.

Chief Justice

Judges.

20. A Judge of a High Court, not being eligible for pension at a higher rate under Rule 27 or 28, shall, after an actual service of eleven-and-a-half years as Judge, receive a pension not exceeding £1,200 per annum.

Invalid Pension.

30. A Chief Justice or Judge, who retires on medical certificate after six years and nine months' actual service, shall receive a pension not exceeding one-half the amount of pension allowed for the full period of service.

Previous Service

31. In the event of a Judge receiving a pension under the preceding rules he will not be entitled to any other pension or retiring allowance.

32. If a Judge who, at the time of his appointment to a High Court, was a member of the Government of India, shall be entitled to a pension under the rules applicable to him, reckoning the

33. If a Judge who, at the time of his appointment to a High Court, was a member of

33A. The words "a member of one of the Government services in India" in Rules 32 and 33 include an acting member, and for the purpose of these rules acting service in the appointment held at the time of appointment as a Judge of the High Court shall be regarded as substantive.

33B. In the event of the appointment to be a Judge of a High Court of a retired Judge who is in receipt of a pension under the preceding rules, the Secretary of State in Council shall decide in each case whether his salary shall be reduced by the amount of such pension, or by any part of such amount.

Member of the Indian Civil Service.

wife and children.

Transfer to another High Court.

35. If a Judge be transferred from one High Court to another, the period he shall have served in each Court shall count towards his qualification for pension.

Promotion to be Chief Justice.

been appointed.

Extent of Application.

Section IV.—Expenses for Equipment and Voyage.

40 For the purpose of defraying the expenses of equipment and voyage from Europe on first appointment, there shall be allowed—

To a Chief Justice or Judge of any High Court, £300

But no such allowance shall be made to any person who being in India is appointed to the office of Chief Justice or Judge, or who having been in India, is in Europe at the time of his appointment with the intention of returning to India

Reversion to the General Service.

544. (a) An officer subject to the rules of any of the other Chapters of these Regulations, who has for a time been removed from the operation

of such rules by reason of officiating as Judge of the High Court, shall, on return to general service, have to his credit the same amount of service towards Privilege leave as was at his credit when he began to officiate as High Court Judge.

(b) In addition to this, he is entitled to count towards Privilege leave, under the rules to which he is subject, any period that has elapsed since he last he ing applicable to Judges of the High Court

545. If a Judge, who is a member of the Indian Civil Service or a Statutory Civil Servant, shall be permitted to resign his office and remain in the service, all leave which he may have taken as a Judge of the High Court shall be reckoned as if it had been taken under the rules for the leave of absence of members of the Indian Civil Service or Statutory Civil Servants, as the case may be.

Chapter XXIV.—Barrister and Pleader Appointments.

Barristers' Privileges.

546. No Civil officer, whether a member of the Indian Civil Service or otherwise, is entitled to any special privileges by reason of his being a Barrister, unless, on his first admission to the service, he is appointed to some office in which the Local Government, with the sanction of the Government of India, has declared it to be necessary on public grounds to employ a Barrister.

547. The following officers, not being members of the Indian Civil Service, are entitled to the special privileges detailed in this Chapter:—

Barrister and Pleader Judges of the Chief Courts of the Punjab and Lower Burma,	}	if Barristers.
First Judges of Small Cause Courts of Presidency towns,		
Secretary to the Government of India in the Legislative Department,		
Judicial Commissioner or Additional Judicial Commissioner of Oudh and of the Central Provinces,		
Administrator-General and Official Trustee, Bengal,		
Judge of the Court of Small Causes, Rangoon,		
Additional Judicial Commissioner of Sind,		
Administrator-General and Official Trustee, Bombay,		
Legal Remembrancer and Secretary to the Legislative Council, Punjab,		
Administrator-General and Official Trustee, Madras,		

Leave Rules.

548. (a) Except in the case of the Judges of the Legislative Council, Punjab, the furlough and leave of absence of High (26) are also applicable to the officers

(b) The allowances of these officers while on Furlough or Subsidiary leave must not exceed half their salaries at the time of proceeding on leave, and are limited also to the rate prescribed in Statutory Rule No. 14, Article 543.

L C Government of India in the or Additional Judicial ; of the Judge of the Court of Small Causes, Rangoon ; of the Administrator-General of Bengal ; and of the Administrator-General and Official Trustee at Bombay or Madras, is regulated by the rules in Part III.

Special Pensions.

549. (a) Special pensions are admissible as follows, but the officers named in Article 547 are otherwise subject to the " Ordinary Pension " Regulations in Part IV :—

(1) After an active service of not less than $11\frac{1}{2}$ years, a Retiring pension of £1,000 a year in the case of Judges of the Chief Courts of the Punjab and of Lower Burma ; and £750 a year in the case of persons holding any of the other Barrister appointments specified in Article 547.

NOTE.—[(1) A Chief Court Judge who renders officiating active service as a High Court Judge is entitled to count such service towards his pension as a Chief Court Judge, and (2) a Legal Remembrancer and Secretary of the Legislative Council, Punjab, or a First Judge of a Small Cause Court in a Presidency town, who is appointed Judge of a Chief Court and does not complete $11\frac{1}{2}$ years' active service in either of the appointments, respectively, are entitled to count their active service in the Chief Court towards the pension of £750 a year admissible under this Article.]

(2) After an active service of not less than $6\frac{1}{2}$ years, an Invalid pension not exceeding one-half the amount of pension allowed for the full period of service.

NOTE.—[The above scale of pensions does not apply to Mr. C. W. Chitty, who has elected to remain under the rules previously existing.]

(b) The Active Service of the officers referred to in Article 547 includes, besides time spent on duty, whether in substantive or acting service, Privilege leave, Subsidiary leave, and periods of vacation during which the officer is not on Furlough or Extraordinary leave.

Compulsory Retirement.

550. Officers to whom the rules of this Chapter applied on the 25th June 1901 are exempt from the rule in Article 459 regarding retirement at 55 years of age. Officers who after that date become subject to the rules in this Chapter are required to retire on attaining the age of 60 years.

Chapter XXV.—Members of the Indian Civil Service.

Date of Arrival in India.

551. The date of an officer's first arrival in India is held to be the date on which he reports his arrival at the capital town of the Presidency or province to which he has been posted by the Secretary of State or the Government of India, or at any other station to which he may proceed under the orders of the Local Government.

552. Article 187 in Chapter IX (joining time) provides for the case of an officer being unable from illness to proceed to the seat of Government.

Rules regarding Pay and Allowances.

553. Unless there be something repugnant in the subject or context, pay and allowances are governed by the rules in Part II. Acting allowances are calculated in accordance with the rules in Articles 104 to 108.

Leave Rules.

554. The leave rules applicable are the European Service Leave Rules in Part III.

1. The rules applicable to a member of the Indian Civil Service occupying the position of a High Court Judge are laid down in Chapter XXIII

2. The grant to a member of the Indian Civil Service occupying the position of a Chief Court Judge, of privilege leave, and the conditions under which leave may be combined with vacation on full pay, are regulated by Rule 17 and 24 (A), Article 543

555. Except in the case of Judges of Chief Courts, no leave but Privilege leave and Subsidiary leave preparatory to retirement may be granted to an officer who has completed thirty-five years' service. Any leave other than Privilege leave and Subsidiary leave preparatory to retirement granted before such date ceases to have effect on the date the officer completes thirty-five years' service.

Annuity Deductions.

556. (a) Four per cent. shall be deducted at the time of payment from every officer's pay, and from such of his other public emoluments as are mentioned below :—

If the officer was in the service in 1875 or was appointed to it after passing a competitive examination held before the end of the year 1875, and belongs to the—

Bengal Establishment—Every allowance, excepting—

- (1) Minimum Furlough allowance,
- (2) Subsistence allowance while on Furlough,
- (3) Establishment allowance
- (4) Sumptuary allowance, and
- (5) Travelling allowance.

Madras or Bombay Establishment.—The following allowances, viz. :—

- (1) Acting allowance,
- (2) Deputation allowance,
- (3) Personal allowance,

- (4) Fees,
- (5) Allowances while on Privilege or Subsidiary leave,
- (6) Subsistence allowance when not on leave other than Privilege and Subsidiary leave, and
- (7) Local allowances other than travelling allowance and tentage.

If the officer is appointed to the service after passing a competitive examination held in or after the year 1878—

Every allowance, excepting—

- (1) Minimum Furlough allowance,
- (2) Subsistence allowance while on Furlough,
- (3) Establishment allowance,

- (4) Sumptuary allowance,
- (5) Travelling allowance,
- (6) Tentage

NOTE 1.—[Fees or honoraria paid by Government to Examiners for conducting examinations and rewards for passing examinations in languages are not liable to annuity deductions.]

NOTE 2.—[The deduction prescribed in this Article is not made from the salary of an Ordinary Member of the Council of the Governor-General, or of the Council of the Governor of Madras or Bombay or Bengal, or of the Council of the Lieutenant-Governor of any Province.]

(b) The deduction required by this Article is included in the contribution levied from an officer on Foreign Service of the first and second kind under the rules in Part VII; when, however, an officer is on Foreign Service, and no contribution is made by him or on his behalf under Part VII, he is required to contribute four per cent. under clause (a).

Example—The Chairman of the Commissioners of the town of Calcutta, the Municipal Commissioner for the city of Bombay, or any of the officers referred to in Article 772

Civil Fund Deductions.

557. Deductions on account of subscriptions to Civil Funds shall be made at the time of payment from the emoluments of officers according to the rules of the Fund to which the officer belongs. The Funds are—

A.—Bengal Civil Fund.

C.—Bombay Civil Fund.

B.—Madras Civil Fund.

D.—Indian Civil Service Family Pension Regulations

NOTE.—[The rates of subscriptions to the several Funds are given in Appendix II.]

558. European officers who arrived before 1881-82 are alone allowed to subscribe to the three Civil Funds, A, B and C, but the following Native officers are allowed, on payment of equal subscriptions, to secure like benefits to those which the Civil Funds secure to Europeans:—

Bengal Establishment

Bombay Establishment.

(1) Mr. B. L. Gupta,

(2) Mr. C. Rustamp.

(1) Mr. S. N. Tagore.

(2) " B. De.

(2) " K. J. Badshah.

559. The following officers who arrived in 1881-82, and all European officers junior to them, are required to subscribe under the "Indian Civil Service Family Pension Regulations":—

Mr. A. H. Diack, C.V.O., Bengal, Sir Wilham Meyer, K.C.I.E., Madras; Mr. J. J. Heaton, Bombay.

(1) Specially admitted to the Civil Funds.

(2) Allowed to subscribe to the "General Revenues" at Civil Fund rates.

560. (a) The recovery of subscriptions due on the absentee allowances of subscribers to the Bengal, Madras, and Bombay Civil Funds, is made under the following rules :—

- (1) If the officer is on leave out of India and draws his allowances in England and has not paid his subscription in advance, or made arrangements for its payment in India as it falls due, recovery will be made at the Home Treasury by deduction from his absentee allowances, unless he is a member of the Bengal or Madras Civil Fund, and has exercised the option allowed to members of those funds of postponing the payment of his subscriptions until after return to duty

N.B.—[The option allowed to subscribers to the Bengal Civil Funds of postponing payment of subscriptions on absentee allowances is limited to a period of one year.]

- (2) For payment of leave allowances in any of His Majesty's colonies, warrants will be issued only on condition that the subscriptions shall be either paid in advance or taken by deduction, in the latter case the warrant to the colony should show only the net allowance payable after such deduction.

(b) The recovery of subscriptions due on the absentee allowances of subscribers to the Indian Civil Service Family Pension Regulations is made under the following rules :—

- (1) If the subscriber is in Europe, the rules require his subscription to be paid in England in sterling, and recovery of it will therefore be made at the Home Treasury by deduction from his absentee allowances.
- (2) For the payment of leave allowances in the colonies, the warrants issued will show the gross allowance payable, with instructions to recover the amount of monthly subscription due in sterling.

Retirement and Annuity.

561. An officer who has been twenty-five years in the service, counting from the date of his covenant, or from the date of the despatch of the Secretary of State announcing his appointment (whichever may have been earlier), and who has rendered twenty-one years' active service, is entitled, on his resignation of the service being accepted, to an annuity of £1,000.

562. An officer who resigns the service will, by such resignation, vacate any office under the Government which he may then be holding. But this rule does not apply to the offices of Viceroy and Governor-General of India, Governor of Madras, Governor of Bombay and Governor of Bengal.

563. The resignation of the Civil Service by a Lieutenant-Governor, Member of the Council of the Governor-General, or of the Council of a Governor or of a Lieutenant-Governor, or Judge of a High Court, shall not be accepted unless his resignation of his office is at the same time tendered and accepted.

564. An officer who, having proceeded to India and made or become liable to any payment on account of the provision for the annuity to which

he might become entitled under Article 561, is declared by a medical certificate in due form to be incapacitated for further service and is thereupon permitted to resign the service before he is entitled to such an annuity, is entitled to a gratuity or annuity as follows:—

- (i) for less than five years' service—a gratuity of £500;
- (ii) for five years' completed service—an annuity of £150, rising by £20 for each additional year up to twelve;
- (iii) for twelve years' service—an annuity of £290, rising by £30 for each additional year up to twenty-three;
- (iv) for twenty-three years' service—an annuity of £620;
- (v) for twenty-four years' service—an annuity of £660;
- (vi) for twenty-five years' service (of which less than twenty-one have been active service)—an annuity of £700.

564A. The power of withholding or withdrawing the whole or any part of an annuity under Article 351 shall be exercised only by the Secretary of State in Council.

Unfitness for Further Advancement.

564B. The grant of an annuity to an officer of the Indian Civil Service who is proved to be unfit for further advancement and is removed from service by the Secretary of State on the recommendation of the Local Government and the Government of India, is regulated by Article 353A.

Compulsory Retirement.

565. (a) After thirty-five years' service, counting from the date of his arrival in India, an officer shall not, except for special reasons, and with the sanction of the Secretary of State, retain his office or be appointed to any new office: Provided that if such an officer has held his office for less than five years, he may, for special reasons, with the sanction of the Government of India, be permitted to retain his office until he has held it for five years. The term "office" in this Article includes an officiating appointment.

NOTE.—[This rule does not apply to an officer holding the appointment of a Judge of a Chief Court. Such an officer is required to vacate his appointment on attaining the age of 60 years.]

(b) The period of five years begins to run from the date on which the officer first takes up the office, whether substantively or temporarily, provided that, if temporary he is confirmed without reverting to his substantive appointment; but the currency of the period is not interrupted by any subsequent temporary promotion to a higher appointment.

Chapter XXVI.—Statutory Civil Servants.

566 The following rules regulate the pay and allowances, pension and leave of Statutory Civil Servants :—

Pay and Allowances.

1. The pay or salary of an officer holding an office, the pay of which has been fixed with a view to its being held by a member of the Indian Civil Service or a member of a Commission, is, unless otherwise specially ordered, 64 per cent of what would be the gross pay or salary of the office if it were held by a member of the Indian Civil Service.

2. The subsistence allowance of an officer when out of employ is as follows :—

To an officer who has rendered not more than eight years active service for defined in Part 1 (Para. 1, Part 1, and 1)	Ra.
"	250
"	330
Service	400

Pension Regulations

Section 1 —In these Regulations—

"Active Service" means active service in an office ordinarily held by a member of the

service of the officer = not less than—	service a period of leave out of India not exceeding—	counts = service a period of leave in India not exceeding—
15 years	1 year	1 year
25 "	2 years	1 "
30 "	....	2 years.

NOTE 1—[The figures in columns 2 and 3 are not cumulative, that is, an officer may not count two years' leave in 15 years' service or more than two years' leave in 25 or 30 years' service.]

NOTE 2.—[Total service in this clause means total service reckoning from the date of commencement of service qualifying for pension and includes periods of leave.]

Section 2 — Except with the special sanction of the Governor-General in Council, an officer who has reached the age of 55 years shall not be appointed, either substantively or officiating, to a new office, or be permitted to retain any office which he has held either substantively or officiating, for five years.

N B—[The period of five years begins to run from the date on which the officer first takes up the office, whether substantively or temporarily, provided that, if temporary, he is confirmed without reverting to his substantive appointment, but the currency of the period is not interrupted by any subsequent temporary promotion to a higher appointment.]

Section 3.—Pension shall in no case exceed Rs. 5,000 a year after an active service of not less than 25 years, and Rs. 6,000 a year after an active service of not less than 30 years. All the rules in this part are subject to these maxima.

Section 4.—(a) On his resignation of the service being accepted after not less than 25 years' active service, an officer is entitled to a retiring pension of half his average salary during the last three years of his active service.

(5) An officer who, upon a medical certificate in the form prescribed in Article 417, is permitted to resign the service before he has completed 25 years' active service, is entitled to Invalid Pension as follows: -

(1) After an active service of less than ten years, gratuity of one month's pay for each year of active service

(2) After an active service of not less than ten years, pension of Rs 1,500 a year, plus Rs. 150 for each complete year of active service in excess of ten.

Section 5.—(a) An officer removed from the service, under Section 2, after an active service of less than 25 years, is entitled to a Superannuation pension.

(b) On reaching the age of 55 years, an officer may retire upon a Superannuation pension, the amount of which is the same as that of an Invalid pension.

Section 6.—(a) An officer who filled a pensionable office before his appointment to an office ordinarily held by a member of the Indian Civil Service, may, at his option, count his whole pensionable service and receive a consolidated pension made up as follows:—

(1) That proportion of the pension to which he would have been entitled under Sections 4 and 6 if his whole service had been passed in an office ordinarily held by a member of the Indian Civil Service, which his active service in such an office or offices bears to the whole of his qualifying service.

(2) That proportion of the pension to which he would have been entitled if his whole service had been in an office not ordinarily held by a member of the Indian Civil Service, which his previous qualifying service bears to the whole of his qualifying service.

(3) If such an officer is entitled to gratuity only, his gratuity shall be calculated as if his whole service had been passed in an office ordinarily held by a member of the Indian Civil Service.

Section 7.—The procedure upon an application for pension and upon the payment of pension is that described in *Chapter XLIX.*

Leave Regulations.

Section 1.—In these Regulations—

"Average salary" means average salary for a month, calculated for so much of the three years immediately preceding the day on which an officer gives up office as he has passed on duty, or on Privilege or Examination leave. Average salary in excess of Rs 1,400 a month is not reckoned.

"Service" means all qualifying service, whether rendered in an office ordinarily held by a member of the Indian Civil Service or otherwise and includes periods spent on leave with allowances.

Section 2.—During leave on Medical Certificate in excess of fifteen months at one time he was last before on duty.

NOTE.—[A Statutory Civil Servant who is compelled owing to ill-health to take any leave with allowances out of India is entitled to the benefits of Article 342.]

Section 3.—Leave on medical certificate may be granted for three years in all, but not for more than two years at one time.

Section 4.—(a) An officer may take either Leave on Private Affairs or Furlough as follows, but not both these kinds of leave—

(b) Leave on Private Affairs may be taken, first, after not less than six years' service, and thereafter at intervals of not less than six years. The duration of Leave on Private Affairs must not exceed six months at one time.

(c) Furlough, not exceeding two years in all, may be taken, first, after not less than ten years' service, and thereafter at intervals of not less than eight years, provided that an interval of not less than eight years shall elapse between the termination of one leave or furlough and the commencement of another. Furlough may be taken for a period of not less than two years.

NOTE.—[The Government of India may relax the condition requiring an interval of 10 months to elapse since last return from privilege leave of over 6 weeks' duration, before furlough can be granted under this Section, in cases in which its enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State.]

Section 5—Subsidiary leave, Privilege leave and Examination leave may be granted under Part III.

Section 6.—The Local Government may grant Extraordinary leave without allowances at its discretion. Subject to the provisions of Section 10, there is no limit to the length or frequency of leave under this section, and it may be granted in continuation of any leave with allowances.

Section 7.—Leave taken by an officer before his appointment to an office ordinarily held by a member of the Indian Civil Service shall, for the purpose of calculating the leave admissible to him under this Chapter, be treated as leave taken under this Chapter.

Certificate.

1. Extraordinary leave cannot be changed retrospectively into Leave on Medical Certificate, but leave on Medical Certificate may be given in continuation of Extraordinary leave.

Section 9—An officer who has reached the age of 55 years is not eligible for any leave except Privilege leave. Leave, other than Privilege leave, granted to an officer before his fifty-fifth birthday cannot extend beyond that date.

Section 10—If an officer is absent without leave, or remains absent after the end of leave (excepting Privilege leave, in which case a week's grace is allowed), he vacates his appointment, after five years' continuous absence from duty, whether with or without leave, an officer ceases to belong to the public service.

1. A Statutory Civil Servant who takes leave other than Privilege leave, or Examination leave, has no claim to return to the particular appointment from which he took leave.

Section 11.—The procedure upon application for leave is that prescribed in Part IX.

Chapter XXVII.—Ecclesiastical Officers.

SECTION I.—BISHOPS.

is re
date

amended by Royal Warrants, dated 28th July 1888 and 11th February 1901.

N.B.—[The italicised headings are introduced merely to facilitate reference and are not in the Statutory Rules.]

Statutory Rules.

1. Bishops may be allowed leave of absence either on medical certificate or on furlough.

Leave on Medical Certificate.

2. The amount of leave of absence on medical certificate admissible to a Bishop is limited to two years.

3. Subject to the Limitation in Rule 2 leave of absence may be granted to a Bishop upon medical certificate for a period not exceeding one year. Leave so granted may be extended upon medical certificate to any period not exceeding eighteen calendar months.

Furlough.

4. The amount of furlough earned by a Bishop is one-eleventh of the time during which he has been on duty and the furlough due is the amount earned diminished by the amount taken.

6. *Cancelled.**Extraordinary Furlough.*

otherwise admis-
or on the recom-
ment of Madras or

The grant of such extraordinary furlough will be subject to the limitation that no further expenditure of the revenues of India be thereby entailed, and to the following conditions:—

- (a) That the purpose for which the leave is granted shall be specified in the Gazette Notification granting it.
- (b) That a second or subsequent period shall in no case be granted unless 33 months' active service has been rendered after the last preceding period.

None of the above conditions shall apply to cases in which the leave is granted for the purpose of attending to the duties of the office of the Bishop or Chaplain.

6B. Extraordinary furlough under Rule 6A may be prefixed or affixed to ordinary furlough subject to a maximum limit for the combined leave of six months in all.

7. Furlough and leave on medical certificate cannot be taken in continuation of each other; but furlough granted under these rules may be retrospectively changed into leave on medical certificate.

Acting Allowance of Locum Tenens.

7A. A Bishop on long leave in Europe must, if the leave was granted or has been extended on account of ill-health, whether it be technically leave on medical certificate or not, satisfy the Medical Board at the India Office as to his fitness for return to duty. Ordinarily he must attend at the India Office for the examination by the Board, but, in special cases, particularly if he be residing at a distance of more than 60 miles from London, a certificate in a form to be obtained from the India Office from two medical practitioners may be accepted. On the required evidence of fitness being furnished the Bishop will receive from the India Office permission to return to India.

8. An Archdeacon or a Chaplain appointed to hold charge of a Diocese during the absence of a Bishop is entitled to an allowance of Rs. 500 a month in addition to the pay of his substantive office.

Absentee Allowance.

9. A Bishop while absent upon furlough or upon leave on medical certificate is entitled to full pay less Rs. 500 a month, but not to any other allowances.

Travelling and similar Allowances of Locum Tenens

10. An Archdeacon or a Chaplain appointed to hold charge of a Diocese during the absence of the Bishop upon leave on medical certificate, is entitled to the travelling and other similar allowances admissible to the Bishop.

Acting Allowances of Locum Tenens of Metropolitan.

Bishop of Calcutta] will receive during such absence the salary of his office less Rs. 833-5-4 per mensem

Grant of Leave.

12 Leave under these rules may be granted to the Metropolitan by the Governor-General in Council, and to the Bishops of Madras and Bombay by the Governments of those Presidencies on the recommendation of the Metropolitan.

567A. A Statutory Bishop, who at the time of his appointment as such was a member of any of the Government services in India and had at his credit furlough without medical certificate under the rules applicable to the branch of the service to which he belonged, may be granted furlough for a period not exceeding the amount so standing at his credit; provided that such furlough shall not be taken until after the completion of two years' actual service as a Bishop, and shall not exceed six months.

568. A Bishop of Madras or Bombay exercising the Episcopal Jurisdiction and Functions appertaining to the See of Calcutta during the vacancy of the See by the demise of the Bishop thereof for the time being, or otherwise, is entitled to the full pay fixed for the office, viz., Rs. 3,831-6-8.

569. An Archdeacon or a Chaplain appointed to hold charge of the Diocese of Calcutta, Madras, or Bombay during a vacancy in the See is entitled to an allowance of Rs. 500 a month in addition to the pay of his substantive office, provided that the arrangement does not involve any extra expense to the State beyond what would be incurred if the Bishop were present on duty. He is also entitled to the travelling and other similar allowances admissible to the Bishop; but the grant of visitation allowance is subject to the restriction laid down in Articles 1112 and 1149.

569A. (a) The pension of the Bishop of Calcutta is regulated by the provisions contained in 53 George III, Cap. 155, 4 George IV, Cap. 71, and 5 George IV, Cap. 85; and subject to the conditions and limitations contained therein, he is eligible for pensions not exceeding £1,500, £1,000 or £750 a year after he has rendered active service in India as Bishop for ten, seven and five years, respectively. The pension of the Bishops of Madras and Bombay is regulated by the provisions contained in 3 and 4 Will. IV, Cap. 85; and subject to the conditions and limitations contained therein, they are eligible for a pension of £800 a year on completion of fifteen years' active service in India as Bishop.

(b) When a Statutory Bishop, who at the time of his appointment as such was a member of one of the permanent services in India, is permitted to retire without becoming entitled to a statutory pension, he will receive such pension as he might receive under the rules applicable to the branch of the service to which he so belonged and will reckon the period of his service as Bishop towards that pension.

570. The official status of the Bishops of Lahore, Rangoon, Lucknow and Nagpur is that of a Senior Chaplain, and they are subject to all the rules in Articles 573 to 599, except the proviso contained in Article 583 (a) (IV). Articles 567, 567A and 569A do not apply to them.

SECTION II.—ARCHDEACONS, AND PRESIDENCY SENIOR CHAPLAINS OF THE CHURCH OF SCOTLAND.

571. The following special allowances are granted to Archdeacons and Presidency Senior Chaplains of the Church of Scotland :—

	Substantive Officers.	Officiating Officers.
	Rs.	Rs.
Archdeacon of Calcutta, Madras or Bombay	266½	166½
Archdeacon of Lahore or Presidency Senior Chaplain of the Church of Scotland in Calcutta	200	100
Presidency Senior Chaplain of the Church of Scotland in Madras or Bombay	150	75

572. (a) Formal appointment of the Archdeacon by the Government

the Government has directed the Archdeacon to undertake the Bishop's jurisdiction or to take charge of the Diocese is sufficient.

(b) The allowance of Rs. 500 is paid to an Archdeacon or Acting Archdeacon for holding charge of the Diocese in addition to his allowances as Archdeacon or Acting Archdeacon.

SECTION III.—CHAPLAINS.

Residence and Service.

573. (a) Residence (or Active Service) is reckoned, in the case of a Chaplain appointed in England, from the date of his arrival in India; and in the case of a Chaplain appointed while resident in India, from the date on which he takes charge of his office, but he must not assume charge before the despatch from the Secretary of State appointing him is received in India. Residence includes, besides time spent on duty,—

(i) Privilege and Subsidiary leave.

(ii) Time passed out of employ in India otherwise than on leave.

NOTE.—[Probationary service, whether passed under Government or not, counts as 'Residence' subject to the provisions of Article 576, Civil Service Regulations.]

(b) "Service" includes "Residence" and also all time spent on leave of any description, but (except as provided in Article 576) no period before the beginning of "Residence."

Date of Arrival in India.

574. A Chaplain is held to have arrived in India on the date on which he reports his arrival either at the head-quarters of the Diocese to which he is attached (in the case of the Church of Scotland, at the head-quarters of

the Presidency to which he is appointed) or at any other station to which he may be appointed or directed to proceed.

575. (a) A Chaplain on the Bengal Establishment who is posted in England to the Lahore Diocese or to any station in the Central Provinces, or north of Allahabad, who comes to India *via* Bombay, or by direct steamer to Karachi, and who is instructed by the Secretary of State to enquire from the Secretary to the Government of Bombay, or, at Karachi, from the Commissioner in Sind, for orders as to his ultimate destination, is held to have arrived in India on the date on which he reports his arrival at the station to which he is directed to proceed in the orders he receives at Bombay, or at Karachi, if he travels by direct steamer to that port.

(b) A Chaplain who is *not* on the Bombay Establishment and who is *not* posted to any station in the Lahore Diocese or to any station in the Central Provinces or north of Allahabad, but who comes out to India *via* Bombay, is held to have arrived in India from the date on which he reports his arrival at the Presidency town of the Presidency to which he is attached, or if he receives orders at Bombay to proceed to any particular station, from the date of his arrival at that station.

(c) The report of arrival, in each instance, is to be made to the Bishop of the Diocese to which the Chaplain is attached. In the case of the Church of Scotland report of arrival is made to the Presidency Senior Chaplain of the Presidency to which the Chaplain is appointed.

Probationers.

576. A Chaplain serves on probation for two years (three years in the case of those who entered the service on or before the 22nd September 1915), at the end of which he is, if reported fit by a Medical Board in India and considered qualified by the Bishop of his Diocese (in the case of the Church of Scotland by the Presidency Senior Chaplain of the Presidency), confirmed as a Junior Chaplain. Time spent in India on service under the Additional Clergy Society, or on other approved service, may be included in the period of probation. Probationary service, which is passed under the Government, counts in all cases towards leave and gratuity, and if the Chaplain was appointed after the 17th March 1892, it also counts towards pension. Probationary service, which is not passed under the Government, does not count towards leave or gratuity, but if the Chaplain was appointed after the 17th March 1892, it counts towards pension.

NOTE.—[A clergyman must have been three years in orders and must be in priest's orders and must have attained the age of 27 years before his nomination as a probationer, or before he can count approved service not passed under Government towards probation. This condition does not apply in the case of the Church of Scotland Establishment.]

577 to 579. *Cancelled.*

Rules regarding Leave.

NOTE.—[A Chaplain on probation is entitled to the same leave as if he held a substantive appointment.]

580. The amount of Furlough "admissible" to a Chaplain is limited to six years. All the rules in this Section are subject to this limitation.

581. The amount of Furlough "earned" by a Chaplain is one-fourth of his Active Service, and (in the case of Chaplains appointed before the 29th July 1906) three months in addition thereto.

582. The amount of Furlough "due" to a Chaplain is the amount which he has earned, diminished by the amount of Furlough which he has enjoyed.

583. (a) To a Chaplain who has rendered three years' Continuous Service, Furlough for not more than two years may be granted as follows :—

Firstly, on medical certificate, unconditionally (see Articles 828 to 832 and 836 to 838, for the procedure rules.)

Secondly, without medical certificate, subject to the following provisions :—

- (i) that the Furlough be due to him ;
- (ii) that he has rendered seven years' Active Service ;
- (iii) that an interval of not less than eighteen months has elapsed between his last return from privilege leave of over six weeks' duration, and the furlough or privilege leave, if any, with which the furlough is combined. In the case of privilege leave combined with other leave which does not interrupt Continuous Service (Article 22) the period of eighteen months begins to run from the date subsequent to that of the end of the combined leave ;
- (iv) that the whole number of Chaplains absent on Furlough and Special leave does not exceed the limit appointed by the Government of India. Except on medical certificate or on very urgent private affairs, Furlough or Special leave may not be granted to a Church of England Chaplain if twenty per cent. of the whole number of Chaplains belonging to his Diocese (or to a Church of Scotland Chaplain if twenty per cent. of the whole number of Chaplains belonging to his Presidency) are already absent on Furlough or Special leave. The Bishop of Calcutta will report to the Government of Bengal and Bihar and Orissa and the Chief Commissioner of Assam (as the case may be) when the limit is reached, and the Bishops of Madras, Bombay, Lahore, Rangoon, Lucknow, or Nagpur, as the case may be, to their respective Local Governments. In the case of the Church of Scotland, the Presidency Senior Chaplain, Bengal, will report to the Local Governments under whom the Chaplains are serving and the Presidency Senior Chaplains of Madras and Bombay to their respective Governments.

NOTE.—[The Government of India may relax the following conditions governing the grant of furlough to a Chaplain under clause (a) of this Article, in cases in which their enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State :—

- (1) three years' continuous service ;
- (2) seven years' active service ;
- (3) an interval of eighteen months since last return from privilege leave of over six weeks' duration]

(b) Furlough taken under this Article may, on medical certificate, be extended to not more than three years.

(c) The Furlough of a Chaplain is strictly limited to a period of three years at one time, and cannot be extended even without allowances. But the Secretary of State reserves to himself the power of allowing a Chaplain to remain in Europe beyond three years, should special and exceptional circumstances require it.

584. (a) To a Chaplain who has not rendered three years' Continuous Service, Furlough may be granted on medical certificate as follows :—

(i) If the furlough due exceeds a year—to the extent due, not exceeding two years.

(ii) If the Furlough due does not exceed a year—for not more than one year.

(b) Furlough granted for less than two years under clause (a) (i), or less than one year under clause (a) (ii), may, on medical certificate, be extended to the extent of the Furlough due not exceeding two years, or to one year, respectively.

Furlough Allowances.

585. (a) A Chaplain on Furlough is entitled to allowances as follows :—

	Ordinary Furlough. £	Other Furlough. £
Archdeacon of Calcutta, Madras or Bombay, and the Presidency Senior Chaplain of the Church of Scotland at the same places.	600 a year.	480 a year.
Senior Chaplain	500 "	384 "
Junior Chaplain	350 "	300 "

An Archdeacon of Lahore, Rangoon, Lucknow or Nagpur draws no extra furlough allowance by reason of his office as Archdeacon.

NOTE I.—[A Junior Chaplain appointed a Senior Chaplain while on furlough is entitled to the higher furlough allowance specified in this Article from the date of such appointment.]

NOTE II.—[A Chaplain on probation while on furlough is entitled to the same furlough allowance as a Junior Chaplain.]

(b) To a Chaplain proceeding on Furlough to England (not combined with privilege leave), an advance of the first quarter's allowances may be made, which advance is not recoverable in the event of his death.

(c) Ordinary Furlough includes—

(i) the first two years of each separate period of Furlough under Article 583 ;

(ii) so much of Furlough under Article 584 as may be due : Provided that the Chaplain has rendered six months' Continuous Active Service.

A Chaplain on Furlough or special leave does not forfeit his past leave allowances by resigning the service without returning to India.

586. A Chaplain returning from Furlough out of India is not granted an advance of allowances for more than thirty-five days beyond the date of embarkation for India.

Special Leave.

587. Special leave on urgent private affairs may be granted at any time for not more than six months :

Provided that a Chaplain who has had special leave must render six years' Active Service before he can again have such leave.

588. For the first period of a Chaplain's Special leave he is entitled to the leave allowance admissible during ordinary Furlough. In subsequent periods he is entitled to no leave allowance.

Subsidiary Leave.

589. The Subsidiary leave of a Chaplain and the beginning and ending of his furlough and special leave are regulated by the rules in Chapter XIII.

590. A Chaplain on Subsidiary leave is entitled to the same allowances as during the leave to which it is subsidiary.

591. A Chaplain may draw allowances as if he were on Privilege leave, for any part of his Subsidiary leave, for which, if he were not retiring from the service or going on furlough or on special leave, privilege leave would be admissible to him.

Privilege Leave and Extraordinary Leave.

592. Privilege leave may be granted—

- (a) to a Chaplain appointed on or after the 29th July 1906, under the rules in Chapter XII ;
- (b) to a Chaplain appointed before the 29th July 1906, as follows :—
 - (i) After five months' uninterrupted duty,—for not more than one month
 - (ii) After ten months' uninterrupted duty,—for not more than two months.
 - (iii) After fifteen months' uninterrupted duty,—for not more than three months.

593. Privilege leave to the amount due may be prefixed as such to Furlough, Special leave on urgent Private Affairs, and Extraordinary leave without allowances, under the conditions prescribed in Article 233 : Provided that when Privilege leave is so combined, the amount of the Privilege leave due shall be calculated under the rules in Chapter XII.

594. In applying for Privilege leave, a Chaplain must, except when the leave is combined with other leave under Article 593, record the declaration prescribed in Article 826.

1. An officer who has been granted privilege leave in combination with other leave is not permitted to resign the service until a period of at least six months has elapsed from the beginning of his combined leave.

595. A Chaplain may not take Privilege leave under Article 592 (b) in instalments.

596. A Chaplain on Privilege leave shall be deemed to be on leave as if he

rent as if he

1914 is not

tion with furlough or other long leave.

allowance.

3. The Chaplain's substitute may draw the house-rent, although it is also drawn by the absentee.

597. Extraordinary leave may be granted under Article 332.

Benefices in the United Kingdom.

598. (a) A Chaplain in receipt of leave or furlough allowances who desires to accept a benefice in the United Kingdom, or to take up other employment, must obtain the previous permission of the Secretary of State in Council or of the Government of India according as his leave is taken out of or in India

(b) Should he, after duly obtaining such permission, accept a benefice, his Indian appointment will be deemed vacant on the expiry of any leave which may have been granted to him, unless before the expiry of his leave he shall have resigned the benefice after having first obtained the consent of the Secretary of State and of the Bishop of the Diocese in which the benefice is situated to his doing so. No extension of leave will under any circumstances be granted to a Chaplain drawing leave or furlough allowances who has accepted a benefice in the United Kingdom, unless he has resigned the same before the expiry of such leave or furlough with the consent before mentioned.

NOTE.—(In applying these orders in the case of a Chaplain of the Church of Scotland, the word "Presbytery" should be substituted for the words "Bishop of Diocese" in the fifth line.)

Right and Title to Pension.

599. Chaplains are entitled to pension according to the following scale :—

Gratuity and Pension on Medical Certificate.

Chaplains appointed before 17th March
1892.

Chaplains appointed after 17th March
1892.

	Per annum.
	£ s. d.
Seven years' residence and over .	127 15 0
Ten years' residence and over .	173 7 6
Fifteen years' residence and over .	292 0 0

	£ s. d.
Under ten years' residence, for each completed year, a gratuity of	80 0 0
Per annum	£ s. d.
Ten years' and over a pension of	127 15 0
Thirteen years' and over a pension of	173 7 6
Eighteen years' and over a pension of	292 0 0

Retiring Pension.

Chaplains appointed before 17th March 1892.

Chaplains appointed after 17th March 1892.

1892.			1892.		
Per annum.			Per annum		
£ s. d.			£ s. d.		
After 17 years' residence and 20 years' service	365	0 0	After 20 years' residence and 23 years' service	365	0 0

NOTE 1—(a) Gratuities are subject to a maximum of £720.

(b) The invalid pensions of £127-15-0 and £173-7-6 a year are admissible only after a trial of a temperate climate and upon a certificate from the Medical Board attached to the India Office that the officer is permanently unfit to serve in India.]

Exception—A Chaplain who, having completed the period of probation, is not confirmed

599A. A non-statutory Bishop of Lahore, Rangoon, Lucknow or Nagpur, if not borne upon the ecclesiastical establishment previous to appointment shall be entitled—

- (i) to the pension and gratuity provided for Chaplains in Article 599, subject to the conditions that the gratuity of a Bishop invalided before completing 10 years' service shall be calculated at the rate of £120 per year of completed residence (as defined in Article 573), and that the maximum and minimum of such gratuities shall be £1,080 and £200 respectively;
- (ii) to reckon as residence and service qualifying for retiring pension (but not for invalid pension) the number of completed years by which his age may at the time of appointment have exceeded 30 years, subject to the proviso that 5 years shall be the maximum period which can be so added.

Compulsory Retirement.

600. (a) A Chaplain must retire after twenty-five years' service, unless specially exempted by the Secretary of State, on the recommendation of the Governor-General in Council, or if he belongs to the Madras or Bombay Establishment, or to the Bengal (Calcutta) Establishment and is serving in the Presidency of Bengal, of the Governor in Council of his Presidency.

(b) The Local Government may require a Chaplain to retire at the age of 55 years, provided that he has rendered sufficient service to qualify for a retiring pension under Article 599. Chaplains who entered the service on or before the 22nd September 1915 may, however, be permitted, before being compelled to retire, to enjoy any furlough that may be due to them at the time when they reach the age above-mentioned.

NOTE—[The furlough granted under this clause is subject to the limit of two years, prescribed in Article 583 (a)]

Leave after Completion of Period of Service.

601. No leave, other than Privilege leave under Article 592, may be granted to a Chaplain who has completed twenty-five years' service. Leave other than Privilege leave granted to a Chaplain before completion of twenty-five years' service ceases to have effect on such completion.

NOTE.—[Articles 600 and 601 do not apply to the Bishops of Lahore, Rangoon, Lucknow and Nagpur (see Article 570).]

SECTION IV.—MINISTERS OTHER THAN CHAPLAINS.

602. A Clergyman appointed under the orders of the Government to perform the duties of a Chaplain on the regular establishment is entitled to an allowance of Rs. 100 a month.

603. The allowances of a Clergyman (whether of the Additional Clergy Society or any other recognised Society) are regulated by the Local Government within an annual grant for each Government.

Chapter XXVIII.—Military Officers.⁽¹⁾

SECTION I.—PAY, ALLOWANCE, AND LEAVE RULES.

604. The acting allowances of Military Officers in Civil employ are governed by the rules in Articles 104 to 116, and the leave of Military Officers subject to the Civil Leave Rules is granted under the European Service Leave Rules in Chapter XIII.

605. The Local Government may grant Furlough or leave under Military Rules or Special leave under Article 316 to a Military Officer subject to the Military Leave Rules.

(1) The following is the rule of the Military Department for regulating the treatment of regimental officers selected for temporary employment in certain Civil Departments:—

Clause 122.—With the sanction of the Secretary of State for India, it is notified that a regimental officer selected for temporary employment with a department of the State in an appointment other than those * whose seconding is regulated by the provisions of paragraph 4 of G. G. O. No 811 of 1877, will on the expiration of a year of such temporary duty, be seconded, provided that the department employing him certifies that there is a fair likelihood of his being brought on the permanent establishment of that department; otherwise he must immediately be returned to his regiment.

An officer so seconded must either return to his regiment at the end of five years, or be struck off its strength on retention in a department for any period beyond that term.—(*Indian Army Circulars, Military Department, No 1451, dated 20th October 1880.*)

NOTE 1.—[The grant of furlough other than on medical certificate to a Military Officer in Civil employ is subject to the condition that a period of not less than eighteen months has elapsed since his last return from privilege leave of over six weeks' duration. This condition may, however, be relaxed by the Government of India in cases in which its enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State.]

NOTE 2.—[The grant of furlough or leave, other than privilege leave, out of India to a Military Officer subject to the Military Leave Rules carries with it the grant of subsidiary leave under the provisions of Article 322.]

606. A Local Government may also grant Short Leave (under Civil or Military rules, as the case may be) to a Military Officer subject to the Military Leave Rules.

NOTE 1.—[This Article also applies to officers of the British Service employed in a Civil Department in India.]

NOTE 2.—[Privilege leave in combination with other leave is admissible to a Military Officer in Civil employ under the conditions and limitations in Article 233, but not under the military rules promulgated with India Army Order No 64, dated 1st February 1904.]

NOTE 3.—[A Military Officer employed in the Army Department Secretariat of the Government of India, or as Private Secretary to a Lieutenant-Governor, or as an A.D.C. appointed from Military employment, is not entitled to privilege leave under Chapter XII of these Regulations.]

607. No other leave of absence may be granted under the Regulations in Part III to a Military Officer subject to the Military Leave Rules.

1. An officer proceeding on furlough or leave under Military Leave Rules forfeits, *ipso facto*, his lien on any acting appointment. Consequently, a Military Officer in Civil employ, with no substantive appointment in the Civil Department, loses, on proceeding on such furlough or leave, his lien on any temporary or officiating appointment in the Civil Department that he may have held, if he has to revert to Military employ in order to obtain the leave.

608. No leave can be granted, under the rules in Part III, to a Departmental Officer or Warrant Officer, except under Article 606.

609. The allowances of a Military Officer subject to the Military Leave Rules during Subsidiary leave are regulated as if he were subject to the Civil Leave Rules: Provided that—

- (i) If under the action of the Leave Rules such an officer has lost his lien on his appointment, he draws allowances under *Military Leave Rules during his Subsidiary leave*.
- (ii) His allowances on Subsidiary leave must not be less than his allowances during the Furlough to which the leave is subsidiary.

NOTE.—[The subsistence allowance of a Military Officer subject to the Military Leave Rules is that prescribed in Article 108 (b).]

610. Subsidiary leave preparatory to his retirement from the service may be granted to a Military Officer subject to the Military Leave Rules, provided such leave does not vitiate his claim to retire on the date fixed.

611. Whenever the Furlough of a Military Officer subject to the Military Leave Rules begins before embarkation or ends after disembarkation, the Audit Officer should inform the Government of India in the Army Department and the account officer in charge of the officer's record of pension service of the date on which it begins or ends.

SECTION II.—COMPULSORY RETIREMENT FROM CIVIL EMPLOY.

Ordinary Rules.

612. (a) A Military or Naval Officer in Civil employ, after attaining the age of fifty-five years, shall not, except for special reasons, with the sanction of the Secretary of State, retain his office or be appointed to any new office: Provided that, if such an officer has held his office for less than five years, he may, for special reasons, with the sanction of the Government of India, be permitted to retain his office until he has held it for five years. The term "office" in this Article includes an officiating appointment, and the currency of the period of five years is not interrupted by any subsequent temporary promotion to a higher appointment.

of State.]

(b) The period of five years begins from the date on which the officer first takes up the office, whether substantively or temporarily. Provided that if temporary, he is confirmed without reverting to his substantive appointment; but the currency of the period is not interrupted by any subsequent temporary promotion to a higher appointment.

Exception.—Medical Officers of the administrative grades—namely, Surgeon-Generals and Colonels—are not compelled to retire from the service, until they attain the age of 60 years.

613. The undermentioned officers cease to be in Civil employ on attaining the age of 55 years:—

- (a) Military Officers in the Survey of India, unless specially permitted by the Secretary of State, in the interests of the public service, to remain in the department for a further definite period;
- (b) Officers of the Indian Medical Service below the rank of Colonel except Lieutenant-Colonels who are granted extensions of service beyond the age of 55 years until they complete 30 years' service;
- (c) Departmental Officers and Warrant Officers.

614. On succession to the Colonel's allowance, a Military Officer (not holding an appointment the tenure of which is limited to five years) must vacate any Civil appointment which he then holds. But, with the sanction of the Secretary of State in Council, he is eligible for re-appointment or for employment in the same or any other appointment, at the discretion of the Government of India in the Army Department. In such a case, his Civil pay will be reduced by the amount of his Colonel's allowance, which will be included in, and not given in addition to, his consolidated salary.

Public Works Department.

615. The compulsory retirement of military officers in the Public Works Department or in the Engineering Department of State Railways, who are proved to be unfit for further advancement, is regulated by Article 353-A

and Note 3 thereunder. But any such officer, who on reaching the age of 50 years has not attained the rank of Superintending Engineer, will be liable to be called upon to vacate his appointment by the Government of India.

616. Military Officers in the Public Works, Railway and Telegraph Departments cease to be in Civil employ on attaining the age of 55 years.

617. A Military Officer serving in the Public Works or Railway Department must vacate absolutely any appointment he may hold in that Department on succession to the Colonel's allowance.

618. *Omitted.*

619. (a) Article 616 applies to officers of Royal Engineers serving in the Public Works and Railway Departments.

(b) Officers of the Royal Engineers, who have attained or hereinafter may attain the rank of General Officers, must vacate their appointments in the Public Works and Railway Departments. But if an officer at the time of so vacating office is a Chief Engineer, 1st class, or holds a post carrying that rank, he may be continued in the position which he had been required to vacate, for the remainder of the term of five years referred to in clause (c), unless in the meantime he must vacate office by some other Regulation. Officers of the Royal Engineers holding rank below that of Chief Engineer, 1st class, vacating office under this rule are not ordinarily eligible for re-appointment to the Public Works or Railway Department, but exceptions to this rule may, at the discretion of the Government of India, be made in the case of officers who, on account of specially accelerated Military promotion for distinguished service in the field, have reached the rank of Major-General without attaining the departmental rank of Chief Engineer, 1st class.

(c) No Chief Engineer of the Corps of Royal Engineers shall, without re-appointment, hold the same post for more than five years.

(d) The foregoing rules are applicable to officers of Royal Engineers who hold the post of Secretary or of Deputy Secretary to the Government of India in the Public Works Department.

Leave after Completion of Period of Civil Employ.

620. (a) No leave but privilege leave may be granted to a Military Officer in Civil employ, whether subject to the Civil or Military Leave Rules, or to any Naval Officer who is more than 55 years old. Any leave, other than privilege leave, granted in the Civil Department to a Military or Naval Officer in Civil employ before he is 55 years old ceases to have effect on his fifty-fifth birthday, on which date he reverts to Military employ. The absentee allowances of a Military Officer in Civil employ on leave other than privilege leave becomes a Military charge, and he becomes subject to Military

Rules on his fifty-fifth birthday, whether his leave was granted in the Military or the Civil Department.

NOTE —[In the case of a Military or Naval Officer in Civil employ, who reverts to Military employ under the operation of the rules in this Section, privilege leave cannot be granted at the end of the service in the Civil Department for any period which will expire within the three months previous to his reversion.]

(b)
namely,
may be,

Chapter XXIX.—Civil Veterinary Department.

NOTE —[The rules contained in this Chapter apply only to those officers of the Civil Veterinary Department who were transferred to it from the Army Veterinary Department.]

Acting Allowance and Leave Rules.

621. Officers officiating in the Department draw the pay of their Military rank *plus* half the Civil allowance attached to that rank.

622 The leave and leave allowances of Civil Veterinary Officers are regulated by the rules in Chapter XIII applicable to Military Officers subject to the Civil Leave Rules, with the following special conditions :—

- (a) Officers on ordinary furlough, or on special leave carrying allowances, draw half the pay of their military rank *plus* half their civil allowances, subject to the limits laid down in Article 314 for Military Officers subject to the Civil Leave Rules.
- (b) Civil Veterinary Officers are treated, in applying the rules mentioned, as if they had, before entering the Civil Department, been subject to the leave rules for the Indian Army (1886) from the date of their arrival in India.

NOTE 1 —[For the purposes of this rule, the date of arrival in India must be held to be the date of arrival on the last tour of service.]

NOTE 3 —[Previous service in an appointment which has been absorbed into the Civil Veterinary Department counts for the purpose of these rules, as service (substantive or officiating, as the case may be) in that Department.]

Pension Rules.

623 The pension rules of the Civil Veterinary Department are as follows :—

(a) No officer becomes qualified for pension under the scale fixed for the Department until he has rendered ten years' service in it.

(b) Pensions are granted at the rates prescribed for the Army Veterinary Department by the Army Regulations in force for the time being *plus* an addition made on the following scale :—

							£
After 10 years' service in the Civil Veterinary Department							72 a year.
" 15 "	"	"	"	"	"	"	96 "
" 20 "	"	"	"	"	"	"	120 "

(c) Leave, apart from privilege leave, counts as service qualifying towards pension to the extent of two months for every year of actual service.

(d) Retirement is optional after twenty years' service and allowed on medical certificate after fifteen years' service. An officer, who resigns the Civil Veterinary Department before retirement, forfeits all claims to pension under the scale fixed for the Department.

Officers retiring before having completed ten years' service in Civil employ are dealt with under Military rules for pension or gratuity. In the case of an officer invalided before completing ten years' service in the Civil Veterinary Department, the gratuity or pension earned by him under Military rules is increased in the same proportion as the total Civil allowances bear to the total Military allowances earned by him during his period of service in India.

NOTE.—[Previous service in an appointment absorbed in the Civil Veterinary Department counts as service rendered in that Department for the purposes of this rule.]

624. The rules in Chapter XXVIII relating to the retirement of Military Officers in Civil employ upon attaining the age of 55 years apply to Army Veterinary Officers in the Civil Veterinary Department.

625. *Cancelled.*

Family Pensions.

626. The family of a Civil Veterinary Officer recruited from the Veterinary Staff of the Army, is eligible for pension under the provisions of the Royal Warrant, "Pay and Non-effective Pay," applicable to the families of Army Veterinary Officers.

Chapter XXX.—Civil Engineers and Telegraph Officers.

SECTION I.—PAY AND LEAVE ALLOWANCES.

627. The rules in this Chapter apply, to the extent stated in the several Articles, to the following officers :—

- (a) Officers of the Public Works, Railway and Telegraph Departments appointed from the Royal Indian Engineering College at Coopers Hill.
- (b) Stanley Engineers.
- (c) Other Civil Engineers and Telegraph Officers appointed by the Secretary of State.
- (d) Indian College Engineers appointed in India.

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(e) Other Civil Engineers not of purely Asiatic descent appointed in India.

NOTE—[Section III of the Chapter applies not only to the Civil Engineers and Telegraph Officers enumerated in the Article, but also to the following classes:—

- (a) Superior Civil officers of the Telegraph Department not included in clauses (a) and (c);
- (b) Civil Engineers of the class described in clause (e) who are of pure Asiatic descent.]

Commencement of Service.

628. If a Coopers Hill Engineer lands in India on or before the 1st December of the year in which he passes out of College, his service counts from the preceding 1st October, unless another date should be specified in his letter of appointment

629. If a Coopers Hill Engineer is, after completing his three years' residence at College, required to go through a course of practical engineering in England under a Civil or Mechanical Engineer, his service, unless another date should be specified in his letter of appointment, will reckon from the commencement of the practical course, or from such later date as will be consistent with the regulation that he may count as service towards pension the time spent on such practical course to the extent of one year only.

630. The service of a Coopers Hill Engineer, whose case is not provided for in Article 628 or 629, and who does not land in India by the 1st December, and that of any other Civil Engineer appointed by the Secretary of State, counts from the date on which he lands in India.

631. The service of an officer appointed to the Telegraph Department, after training or competitive examination, by the Secretary of State, begins as follows:—

- (i) If appointed after competitive examination, from date of covenant.
- (ii) If appointed after training at Coopers Hill, from date of sailing of vessel selected by the Secretary of State, or 1st October in the year of passing out of the College, whichever is named in his letter of appointment, provided that he reaches India within two months of that date or other approximate date named in his letter of appointment; otherwise from date of arrival in India.

632. The service of an officer appointed in India begins ordinarily from the date on which he takes charge of the office to which he is first appointed.

Rules regarding Pay and Allowances and Leave.

633. Unless there be something repugnant in the subject or context, the rules in Part II govern the pay and allowances of officers to whom the rules in this Chapter apply, the acting allowance rules applicable to them being those in Chapter VI.

634. The Civil Engineers and Telegraph Officers whose leave is regulated by the European Service Leave Rules (Chapter XIII) are enumerated

in Article 297, clauses (c) and (e). The leave of all other officers is regulated by the Indian Service Leave Rules (Chapter XIV).

SECTION II.—PENSION RULES.

635. The rules in this Section apply to all officers of the classes described in clauses (a) to (c) of Article 627.

1 Officers of the Indian Telegraph Department, who may be transferred to the Indo-European Telegraph Department, retain the pensionary privileges of their own branch of the department.

NOTE 1.—[The rules in this Section apply to Mr. J. H. C. Kelly of the Indo-European Telegraph Department and to Mr. T. Ryan of the Indian Finance Department.]

NOTE 2.—[The rules in Article 613 apply to all classes of officers of the Public Works, Railway and Telegraph Departments.]

636. The pensionary claims of Indian College Engineers and of other Civil engineers (whether of purely Asiatic descent or not) appointed in India, and of Telegraph Officers not included under clauses (a) and (c) of Article 627, are governed by the ordinary rules in Part IV. But in the case of officers of this class who may rise to the rank of Superintending Engineer, or in the Indo-European Telegraph Department, of Director, the Government of India will be prepared to consider favourably their admission to the pension rules, including those contained in Article 642, applicable to the officers specified in Article 635:

Provided that Civil Engineers and Telegraph Officers who are members of the Provincial Services of the Public Works, Railway and Telegraph Departments are not eligible for the concession described in this Article.

1. The concession made under this Article does not affect the operation of the rules which determine the age from which qualifying service begins.

637. The Government of India may, on special grounds, recommend for sanction of the Secretary of State the grant of an invalid pension on the scale below to an officer belonging to the classes referred to as appointed in India in Article 627, provided that he be not of purely Asiatic descent. This Article does not apply to officers of the Provincial Service.

Not less than Rs. 1,000 or more than Rs. 2,000 a year.

If the qualifying service of the officer be not less than—

Forty-fifth part of the officer's Average Emoluments.

10 years	.	.	.	.	.	.	.	.	.	10
11 "	.	.	.	.	.	.	.	.	.	11
12 "	.	.	.	.	.	.	.	.	.	12
13 "	.	.	.	.	.	.	.	.	.	13
14 "	.	.	.	.	.	.	.	.	.	14

638. Unless there is something repugnant in the subject or context, the rules of Part IV apply to officers defined in Article 635, but they are modified in the points noted in the following Articles

639. The rule which excludes service under the age of twenty years does not apply to the officers defined in Article 635 or to Indian College Engineers.

- (ii) Officers of the Indian Telegraph Department in the grades of Rs. 2,000 and Rs. 1,750 or as either of the two senior officers in the grade of Rs. 1,500.
- (iii) Directors of the Persian and Persian Gulf Telegraphs in the Indo-European Telegraph Department.

NOTE 1.—[For the purpose of awarding these special additional pensions, Civil Engineers of the classes enumerated in Article 635, in Class I of the State Railway Revenue Establishments, the Deputy Secretary to the Government of India, Public Works Department, and Engineers holding the appointment of Under Secretary, Civil Works Branch, in that Department prior to the 6th February 1914 are treated as of equivalent rank to a Superintending Engineer.]

NOTE 2.—[Mr. T. Ryan of the Indian Finance Department will be eligible to count service for the additional pension of Rs. 1,000 mentioned in this Article, from the date on which he would have reached Class III of Examiners in the late Superior Accounts Branch of the Public Works Department, if he had continued on the old scale of pay.]

NOTE 3.—[The provisions of this Article apply to officers of the Indo-European Telegraph Department appointed up to the 28th July 1896. Those appointed thereafter come wholly under Article 643.]

NOTE 5.—[Clauses (a) (iii) and (b) (ii) of this article apply to services rendered in the specified appointments from 1st April 1914. As regards services rendered before that date, the appointments qualifying for additional pensions are :—

(a) For Rs. 2,000 under clause (a) (iii)

Director General and next senior officer in the Telegraph Department.

(b) For Rs. 1,000 under clause (b) (ii)—

Directors of Telegraphs, 1st, 2nd and 3rd classes, senior Director of Telegraphs, 4th class, and the Electrical Engineer-in-Chief.]

NOTE 6.—[It is important to bear in mind that these additional pensions cannot be claimed as a matter of right, but will be granted at the discretion of the Local Government as rewards of "approved service." See special addition to certificate in Form No. 20 (Pension).]

643. For officers to whom special additional pensions under Article 642 are not admissible, the following special additional pensions may be allowed by the Local Governments :—

Additional pensions of Rs. 1,000 per annum to those who have rendered not less than three years of effective service in the following appointments, provided that in each case during such service the officer has shown such special energy and efficiency as may be considered deserving of the concession. In the case of officers entering Government service after the 31st December 1909, the grant of the additional pension is subject to the further condition that they must, in the event of voluntary retirement, have completed twenty-eight years of qualifying service. Voluntary retirement for the purpose of this rule should be taken as retirement under Articles 465 and 641 (c).

Secretary to the Government of India, Public Works Department.

Chief Engineers in the Public Works and Railway Departments.

Chief Engineer, Telegraphs, Officer of the Indian Telegraph Department in the grades of Rs. 2,250 and Rs. 2,000 or either of the two senior officers in the grade of Rs. 1,750.

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Superintending Engineers, class I, Public Works and Railway Departments.

Deputy Secretary to the Government of India, Public Works Department.

Director-in-Chief of the Indo-European Telegraph Department, when the office is held by a member of either the Indian or the Indo-European Telegraph Department.

Deputy Secretary to the Government of India, Public Works Department.

or

St

Rs 1,500 a month.

NOTE 1—[The provisions of this article apply to officers employed in the Telegraph Department on the 31st March 1913. Those appointed thereafter to the "Posts and Telegraphs" Department come wholly under Article 475.]

NOTE 2—[Note 4 below Article 612 applies also to special additional pensions admissible to officers of the Telegraph Department under this article.]

644. (a) An officer who holds a qualifying appointment substantively counts all active service, whether in the appointment, or in an appointment of corresponding rank and responsibility in foreign service, or on deputation on special duty or in a temporary appointment. He also counts periods of privilege leave taken by him during such service, but periods of leave other than privilege leave do not count.

(b) All officiating and temporary service in a qualifying appointment falling within any of the classes mentioned in clause (a), including periods of such service passed on privilege leave, counts with the exception of periods during which an officer officiates for another absent on privilege leave.

645. *Cancelled.*

SECTION III.—COMPULSORY RETIREMENT.

646. The tenure of the appointment of Director-General of Telegraphs is limited to five years. Extensions of this term can be sanctioned by the Secretary of State alone.

647. No Chief Engineer of the Engineer Branch of the Public Works or Railway Department, nor any officer of corresponding rank in the Superior Revenue Establishment of State Railways, nor any officer holding the office of Secretary or Deputy Secretary to the Government of India in the Public Works Department, can, without re-appointment, hold the same post for more than five years.

NOTE.—[The period of five years referred to in Articles 646 and 647 begins to run from the date on which the officer first becomes entitled to draw the full pay of the appointment whether holding it substantively or only in an officiating capacity provided that if officiating he is confirmed in the appointment without a break of service.]

648. The following rules apply to officers, whether Civil or Military, holding the appointments enumerated below:—

Secretary to the Government of India, Public Works Department.

PART V

Chief Engineers, class I, who have held one appointment with that rank for five years continuously.

- (1) An officer who is granted a special extension of time in any high appointment in the Public Works, Railway or Telegraph Department, the tenure of which is limited by rule, shall not be allowed any leave during such extension except privilege leave and, should longer leave be necessary on account of ill-health, urgent private affairs, or other cause, the extension shall, *ipso facto*, cease from the departure of the officer on such leave.
- (2) An officer who has served his full time in any of the above appointments, who is not given an extension, and for whom no other suitable appointment is available, or who vacates his appointment under rule (1), may be allowed any leave admissible under rule.
- (3) Appointments vacated under the above rules will be treated as substantively vacant from the date of commencement of furlough whether taken by itself or as combined leave.

649. The compulsory retirement of Civil Engineers of the Public Works Department or the Engineering Department of State Railways, who are proved to be unfit for further advancement, is regulated by Article 353-A. But any Civil Engineer of these Departments, who on reaching the age of 50 years has not attained the rank of Superintending Engineer, is liable to be called on to retire by the Government of India.

650. All Civil Engineers in the Public Works and Railway Departments, Civilian Under Secretaries in the Public Works Secretariat of the Government of India or of a Local Government or Administration, and Civilians in the Superior Railway Revenue Establishment, and in the Superior Establishment of the Telegraph Department, are required to retire on attaining the age of 55 years.

NOTE 1.—[The above rule is applicable to all Civilians of the several establishments named whatever the source of their appointment may be.]

NOTE 2.—[The Government of India are empowered in special cases to extend the services of Chief Engineers of the Public Works Department for a period not exceeding three months.]

Chapter XXXI.—Law Officers.

651. The following law officers are entitled to the special privileges detailed in this chapter:—

An Advocate-General; a Standing Counsel, an Official Trustee; an Official Assignee.

A Receiver of a High Court; an Officer of a High Court who holds an appointment which by law can be held only by a Barrister.

A Secretary or an Assistant Secretary in the Legislative Department to a Local Government.

A Remembrancer; Deputy Remembrancer or an Assistant Remembrancer of Legal Affairs.

A Government Advocate and an Assistant Government Advocate.

§ 77 A Clerk of the Crown, a Government Solicitor ; a Government Pleader and a Government Prosecutor.

652. The leave of absence and acting allowances of a Law Officer who is a member of the Indian Civil Service, or a Statutory Civil Servant, are regulated by the rules applicable to the service to which the officer belongs.

653. A Government Pleader or Government Prosecutor is entitled to such leave of absence and allowances when on leave, and to such acting allowances as the authority who appoints him may think fit to grant, provided that no extra expense be caused to the Government.

Officers on full-time Salaries.

654. The leave of absence and acting allowances of a Law Officer who is not a member of the Indian Civil Service, or a Statutory Civil Servant, or a Government Pleader, or a Government Prosecutor, but whose pay is fixed, and whose whole time is retained for the service of Government, are regulated as if he were a member of the Indian Civil Service.

Officers retained on fixed Allowances.

655. The leave of absence and acting allowances of a Law Officer who is not a member of the Indian Civil Service, or a Statutory Civil Servant, or a Government Pleader, or a Government Prosecutor, whose pay is fixed, but whose whole time is not retained for the public service, are regulated by the following rules :—

Active Service

1. "Active Service" includes, besides time spent on duty, leave of absence taken under Rule 3, and Subsidiary leave of absence taken under Rule 8.

Application.

2. An application for leave of absence must be submitted through the officer who passes his pay to the authority to whom the officer is directly subordinate.

Leave during Vacation.

3. Leave of absence during the vacation of the High or Chief Court within whose jurisdiction the officer serves may be granted without deduction of pay, provided that no expense be caused by the grant of such leave.

Medical Certificate.

4. Leave may be granted on medical certificate for a period not exceeding one year, and leave so granted may, on medical certificate, be extended to twenty months.

5. Leave of absence on medical certificate may not be granted again until after three years' "Active Service."

Private Affairs.

6. Leave of absence on private affairs for a period not exceeding six months may be granted once only to an officer who has rendered six years' "Active Service."

Furlough.

7. After four years' "Active Service" Furlough without pay, but with retention of appointment, may be granted for a period not exceeding one year.

Subsidiary Leave.

8. In very urgent cases, Subsidiary leave of absence may be granted under Chapter XIII, provided that no expense be caused by the grant of such leave.

Commutation of Leave.

9. Excepting Subsidiary leave, no kind of leave may be granted in continuation of any other kind of leave; but any leave granted under these rules may be retrospectively changed for any other kind or amount of leave which might at first have been granted.

Commencement and Termination of Leave.

10. If an officer who has obtained leave of absence makes over charge of his office before noon, his leave begins on, and includes, the day on which he makes over charge; otherwise, it begins on, and includes, the following day.

11. If an officer resumes charge of his office after noon, his leave of absence ends on, and includes, the day on which he resumes charge; otherwise, it ends on, and includes, the day before he resumes charge.

Leave Allowances.

12. An officer while on leave under Rule 4, 5 or 6 is entitled to half-pay. Provided that his maximum leave allowance shall be, if paid in India, Rs. 833½ a month, and if paid at the Home Treasury £250 a quarter.

NOTE—[An officer compelled to take leave out of India under Rule 4, 5 or 6 owing to ill health is entitled to the benefits of Article 342. In applying that Article the word "pay" should be substituted for the word "salary"]

Acting Officers.

13. An officer acting for an officer on leave under these rules shall be entitled to the same salary as the officer for whom he acts.

14. An officer acting for an officer on leave under these rules shall be entitled to the same salary as the officer for whom he acts.

(b) Provided that—

- (i) The minimum salary of a Standing Counsel at Calcutta is Rs. 1,000 a month, and that of Assistant Legal Remembrancer, Punjab, Rs. 450 a month
- (ii) The minimum salary of a Government Advocate at Lahore, Allahabad, Rangoon, or Moulemein is three-quarters of the pay of the appointment.

Deputation Vacancy.

14. An officer officiating for an officer deputed to act in another appointment or on special duty is entitled to two-thirds of the pay of the appointment in which he officiates, plus one-third of the pay of his own substantive appointment if any.

NOTE—[The Government of India may, in special cases, increase the allowance under this rule to an amount not exceeding the full pay of the appointment.]

Combination of Offices

15. If an officer holds more than one appointment, his salary is regulated by Chapter VIII

Officers paid by Fees.

656. Leave may be granted under the rules in the preceding Article to a Law Officer who is paid by fees, whether his whole time be retained for the service of Government or not, on condition that he makes such arrangements for the performance of his duties as are satisfactory to the authority by which he is appointed, and on condition that, in case of his obtaining leave on private affairs under Rule 6, the officiating officer shall receive the whole of the fees attached to the office.

Other Officers.

657. An officiating Law Officer who is not subject to the foregoing rules, draws, as acting allowance, the difference between the allowance attached to the appointment and the portion of it drawn by the absentee for whom he officiates. Provided the maximum salary (see Article 96) is not exceeded.

Extraordinary Leave.

658. Extraordinary leave under Article 332 may be granted to the officers in this Chapter.

Chapter XXXII.—State Railway Establishments.

SECTION I.—REVENUE ESTABLISHMENTS.

Classification of Service.

659. In the State Railway Revenue Establishment the different classes of service are as follows:—

(a) *Permanent pensionable*,—that is, service in all permanent appointments made before 1st September 1881, and service of officers, such as Civil Engineers and members of the Engineer and Upper Subordinate Establishment, who may be transferred to the Revenue Establishment, as Managers, &c., even after 31st August 1881.

The service of an officer in the Traffic Department (appointed before 1st September 1881), before he passed the test examination, does not qualify.

NOTE 1.—[If, after 1st September 1881, it is considered advisable to employ on a State Railway any permanent servant of the State whose time is not wholly absorbed by the service of the State, he shall be deemed to be a permanent servant of the State, and shall be entitled to the same status.]

(b) *Permanent non-pensionable*,—that is, service in all permanent appointments made after 31st August 1881, except as allowed for in clause (a).

(c) *Temporary*,—that is, service in appointments made from time to time for periods not exceeding twelve months according to the requirements of traffic.

(d) *Special service*,—that is, service of engine-drivers, firemen and mechanics, etc., under covenant with the Secretary of State, or who, on the expiry of the term of their covenant, have renewed their engagement under a covenant with the Government of India.

660. A subordinate officer transferred before 1st September 1881 from the temporary to the permanent Revenue Establishment of a State Railway may, with the sanction of the Local Government, count towards pension the whole or a part of so much of his temporary service as immediately preceded his qualifying service without interruption.

Ordinary Leave Rules.

661. (a) Leave on medical certificate with half-pay to the extent of sixty days in any calendar year may, in addition to any leave admissible under the Indian Service Leave Rules in Part III, be granted, at the discretion of the Manager, to drivers and other subordinate employes of the State Railway Revenue Establishment, whose service is classed as *Permanent* "*pensionable*" or "*non-pensionable*" under clauses (a) and (b) of Article 659, and who are not employed exclusively on in-door work, provided the illness has not been caused by the man's misconduct.

(b) It may be granted without prejudice to Privilege leave and in continuation of Privilege leave, or *vice versâ*. (See also Rule 1 under Article 260.)

(c) The leave thus granted is included in the leave to which the limit of three years prescribed in Article 336 applies.

662. Leave to members of superior and subordinate State Railway Revenue Establishments classed as "*pensionable*" or "*non-pensionable*" whose referred to in the privileges for European or Indian

Special Service Leave Rules.

663. Members of subordinate State Railway Revenue Establishments whose service is classed as "*special*" under clause (d) in Article 659, may be allowed leave as follows, at the discretion of the Manager :—

(a) Privilege leave on full pay to the extent of one month in twelve, irrespective of the conditions laid down in Article 260. Any subordinate may, however, be permitted to exercise the option of allowing his privilege leave to accumulate up to three months under the usual conditions.

(b) Leave on medical certificate on half-pay to the extent of sixty days in one calendar year, provided that the illness has not been caused by misconduct. This leave may be granted without prejudice to privilege leave, and in continuation of privilege leave, or *vice versâ*. (See also Rule 1 under Article 260.)

(c) In the case of deserving men, the Manager may extend the leave on medical certificate admissible under clause (b) to a maximum of six months in one calendar year.

NOTE.—[The Government of India may delegate the powers of a Manager of State Railways under this Article to Heads of Departments of State Railways.]

664. The Manager may grant furlough according to the following scale to any of the officers mentioned in the preceding Article who can be conveniently spared :—

(a) A first furlough for a period not exceeding—

12 months, after 7 years' service.
14 ditto 8 ditto.
16 ditto 9 ditto.
18 ditto 10 or more ditto.

(b) A second or subsequent furlough for a period not exceeding—

11 months, after 3 years' further service,	} dating from the expiration of the previous furlough, or sick leave.
8 ditto 4 ditto,	
10 ditto 5 ditto,	
12 ditto 6 ditto,	
14 ditto 7 ditto,	
16 ditto 8 ditto,	
18 ditto 9 ditto,	

(c) The period of service upon which furlough may be granted is to be exclusive of time spent on leave of absence of any kind whatever except privilege leave. No second or subsequent furlough shall be granted till after a further actual service of three years, commencing from the date of the expiration of the previous furlough; and no single furlough shall be granted for a longer period than eighteen months.

(d) An officer on furlough is entitled to half the substantive pay of his appointment, excluding all allowances except personal allowances.

NOTE.—[An officer compelled to take furlough, or leave on medical certificate, out of India owing to ill-health is entitled to the benefits of Article 342. In applying that Article the term "pay" should be substituted for "salary."]

(e) The service towards first or subsequent furlough is not cancelled by the grant of sick leave; but an interval of three years of service must elapse between the return of an officer from sick leave lasting more than sixty days and the grant of any furlough that may be due to him.

(f) When an officer has earned either first or subsequent furlough, if from any cause it may be found inconvenient to grant him the whole of the furlough earned, an instalment may be granted, leaving the balance at his credit to be taken when convenient, subject, however, to the maximum limit of eighteen months prescribed above.

Leave in consequence of Accidents.

665. To subordinates on salaries not exceeding Rs. 250 a month, leave in India on full pay may be granted by Managers of State Railways in addition to any leave to be absent from duty with in the execution of duty, subject to a limit of six months and to record in the minutes of official meetings. The period of absence is treated entirely as duty and does not interrupt privilege leave or deprive the absentee of any allowance of the character of salary or local allowance.

Labourers.

666. Labourers in State Railway workshops employed upon daily wages when temporarily absent from work in consequence of injuries sustained while on duty in workshops, etc., may, under the authority of the Managers of the State Railways concerned, be granted allowances, during their absence, as under, the amount not to exceed—

- (i) fifty rupees; (ii) one month's pay; (iii) (in cases where the absence is less than a month) the pay which the absentee would have earned during the period of leave if he were present on duty.

NOTE.—[The Government of India may delegate the powers of a Manager of State Railways under this Article to Heads of Departments of State Railways.]

Recovery of Advances.

667. (a) Advances whether made in India (*see Articles 61 to 66*) or by the Home Government should be recovered by monthly instalments of one-third salary except in the case of Covenanted Mechanics, Boiler Makers, etc., from whom the recoveries shall be in monthly instalments of one-sixth salary.

(b) In the case of Covenanted Engine-Drivers the recovery should be made in such a manner as will ensure their receiving in any month not less than Rs. 25, exclusive of overtime or other allowances.

SECTION II—LOWER SUBORDINATES AND OFFICE AND PETTY ESTABLISHMENTS ON LINES UNDER CONSTRUCTION OR SURVEY.

668. Subject to the exception noted below, the service of all Lower Subordinates, Sub-Storekeepers, and members of the Office and Petty Establishment, appointed to or engaged for lines under construction or survey, on or after the 21st July 1880, is non-pensionable.

Exception—The pensionable service of officers who, before the 21st July 1880, were transferred from permanently sanctioned posts, not attached to railways under construction, is in no way prejudiced by their fresh employment, and they will continue to enjoy their right to pension even if transferred from the line on which they were on that date engaged to another line under construction.

SECTION III.—OTHER OFFICES.

669. The services of all clerks appointed after the 31st January 1889 to all Consulting Engineers' and Port Storekeepers' Offices, and of all Accountants and clerks appointed after the 16th July 1889 to any of the Offices of Examiners of Guaranteed Railway Accounts, do not qualify for pension unless transferred from a permanent pensionable post.

Chapter XXXIII.—The Bengal Covenanted Pilot Service.

SECTION I.—PAY AND LEAVE RULES.

670. For the purposes of the Leave Rules, the pay of the several grades of the service shall be taken to be as follows:—

	Rs		Rs
Branch Pilot	1,000 a month.	1st Mate Leadsman	
Master Pilot	700 "	passed as Mate	
Mate Pilot appointed before		Pilot after 1st	
1st October 1894	450 "	September 1894	175 a month.
Mate Pilot appointed with		1st Mate Leadsman	160 "
effect from 1st October		2nd Mate Leadsman	135 "
1894	400 "	Leadsman Appren-	
		tice	107 "
			Without Exchange Compensation Allowance.

Furlough.

671. Furlough may be taken to the extent of four years during the entire period of service, in the following instalments, viz., after ten years' service, two years, and after every subsequent eight years, one year, on an allowance of half the average pay for the last three years: Provided that no Furlough can be granted to an officer who has taken leave on medical certificate until three years after his return from leave on medical certificate, or to an officer who has taken privilege leave of over six weeks' duration until 18 months have elapsed between last return from such leave, and the furlough, or privilege leave, if any, with which the furlough is combined.

If a portion of an instalment is taken, the remainder may be added to any later instalment: Provided that not more than two years' furlough may be taken at one time.

NOTE 1.—[An officer compelled, owing to ill-health, to take leave out of India under Article 671, 672 or 673, is entitled to the benefits of Article 312. In applying that Article the word "pay" should be substituted for the word "salary."]

NOTE 2.—[The same]

Leave on Medical Certificate.

672. Leave on medical certificate may be taken to the extent of three years during the whole period of service, but not for more than two years at a

time, and not more than twice out of India. Such leave cannot be taken for more than one year, except after three years' continuous service immediately preceding. Leave on medical certificate cannot be counted as service for furlough, and no leave on medical certificate can be taken while any furlough is due. An officer on leave under this Article is entitled to half his average pay for the first fifteen months of each period of such leave, but not for more than thirty months in all. For the rest of his leave under this Article he is entitled to a quarter of his average pay. The minimum furlough allowance during leave on medical certificate to the officer to whom any allowance is due shall be—

	Ra.
In the case of a Branch Pilot, Master Pilot, and Mate Pilot . . .	100 a month
In the case of a Mate Leadsman and Leadsman Apprentice . . .	50 „

Special Leave and Extraordinary Leave.

673. (a) Special leave on urgent private affairs may be granted at any time for not more than six months: Provided that an officer who has had Special leave must render six years' Active Service before he can again have such leave.

(b) For the first six months for which an officer is on Special leave, whether the six months be included in the same leave or not, he is entitled to a leave allowance of half his average pay for the last three years.

(c) Thereafter he is entitled to no leave allowance.

674. Extraordinary leave may be granted under Article 332.

Subsidiary Leave.

675. Subsidiary leave on the terms and conditions prescribed in Articles 321 to 331 may be prefixed and affixed to furlough, leave on medical certificate, and special leave on urgent private affairs, taken out of India.

Privilege Leave.

676. (a) Privilege leave may be taken either under the ordinary rules, or

(b) For a period of two months in every twelve (which cannot be accumulated), on half pay on a medical certificate showing that the applicant requires, through sickness, more leave than he could take under the ordinary Privilege Leave Rules. When such leave is taken in extension of ordinary Privilege leave, the period of ordinary Privilege leave first taken under clause (a) must be commuted to double the period on half pay under this clause. Leave taken under this clause is reckoned as Active Service, but it cannot be combined with other leave under Article 233, and if it is extended under medical certificate, the whole of the leave is treated as leave on medical certificate under Article 672.

(c) The leave authorised in clause (b) may be taken in instalments, but a Pilot may not take leave under clause (a) either by itself or combined with other leave under Article 233 for eleven months after his return to duty from his last leave taken under clause (b).

Leave after Superannuation Age.

677. A Pilot is eligible after he attains the age of 55 years for privilege leave and for any special leave on urgent private affairs to which he may be otherwise entitled. No leave, other than privilege leave or special leave granted to a Pilot before his fifty-fifth birthday, has effect after that date.

SECTION II.—PENSION RULES.**Retiring Pension.**

678. After an actual service of thirty years in India, a Pilot is entitled to a Retiring pension according to his rank, as follows :—

Branch Pilot	Rs. 200 a month
Any lower rank	100 "

Invalid Pension.

679. Upon a certificate (in the form prescribed in Article 445 or 447, as the case may require) of incapacity for further service, from the Medical Board at the India Office, or from the Administrative Medical Officer in Calcutta, or from a Medical Committee over which the Administrative Medical Officer should, when practicable, preside, a Pilot is entitled to an Invalid pension, according to his rank, as follows :—

Branch Pilot	Rs. 200 a month.
Master	100 "
Mate	60 "
Leadsmen Apprentice	30 "
{ (1) Appointed before 3rd Oct. 1909	
{ (2) Appointed on or after ditto	
A gratuity on the scale laid down in Article 474 (a).	

680. A Pilot retiring on an Invalid pension while absent on leave in England or in the Colonies will receive the pension of the rank which he held when his leave began, unless he has been promoted within twelve months from that date, in which case he will receive the pension of the rank to which he has been thus promoted.

Superannuation Pension.

681. A Pilot who has attained the age of 55 years may be required to retire unless the Local Government considers him efficient and permits him to remain in the service. But as the premature retirement of an efficient officer imposes a needless charge on the State, the rule should be worked with discretion. A Pilot who has attained the age of 55 years may not at his option retire from the service on a Superannuation pension. In every case the question whether retirement should be allowed is one for settlement by the Local Government.

682. The scale for Superannuation pensions is the same as that laid down in Article 679 for Invalid pensions.

Leave Counting as Service.

682A. Time passed on leave with allowances counts as service under the conditions and limitations prescribed in Article 408 of these Regulations.

SECTION III.—FAMILY PENSION RULES.

Contributions.

683. (a) Members of the Bengal Covenanted Pilot Service, other than those described in clause (b), must make the following monthly contributions towards the cost of pensions for their widows and orphans :—

Branch Pilot	. . .	Rs 40	Mate Pilot	. . .	Rs 10
Master "	. . .	" 20	Leadsman Apprentice	. . .	" 4

(b) The Pilots whose names are entered below, by monthly contribution of Rs 16 each, secure for their widows pensions of Rs. 100 a month and full pension for their children :—

Anderson, G. M.	Hudson, E. F.	Williams, W. R.
Christie, J.	Raynor, E. T.	

Amount of Pension.

684. Pensions are granted to the widows of Pilots married before their husbands retired on pension from the Service at the following monthly rates :—

	Rs.		Rs.
(i) The widow of a Branch Pilot	100	(iv) The widow of a Leadsman	
(ii) " " Master "	50	Apprentice	15
(iii) " " Mate "	30		

685. Pensions are granted at the following monthly rates to the children of Pilots of all ranks by wives married before their husbands retired on pension from the service :—

(a) To each son until the age of fifteen years	. . . . .	Rs. 12
(b) " daughter until the age of ten years	. . . . .	" 14
(c) " " over the age of ten years until marriage	. . . . .	" 20

686. A wife married to a Pilot after his retirement on pension from active service and her children are entitled to no pension.

Miscellaneous Rules.

687. To entitle widows and orphans to pensions, Pilots must forward to the Port Officer certificates of their marriage, and of the births and baptisms of their children, within a month of the occurrence thereof. Notices of death are in like manner to be forwarded to the Port Officer.

688. Subscriptions by a Pilot for the purpose of securing pensions for his wife and children are refunded in the event of his resignation or dismissal.

689. Widows and female orphans above the age of 15 years must forward to the Accountant-General, Bengal, declarations, half-yearly, in May and November, that they are not married, and that they have not been married at any intervening period. The declarations are to be countersigned by the Executor to the estate of the deceased member of the Pilot Service or pensioner, or by the guardian of an orphan, and by a member of the Pilot Service, or a person exercising any of the powers of a Magistrate, or of a Minister of Religion, certifying to the truth of the declaration to the best of their knowledge and belief. Forms of the declaration will be furnished on application to the Accountant-General, Bengal.

690. If a widow pensioner marries, her pension ceases during her coverture, but in the event of her again becoming a widow, she is readmitted to the pension to which she was entitled during her first widowhood unless her second husband was a member of the Pilot Service, and at his death of a higher grade than her first husband, in which case she is entitled to the pension of the higher rank.

691. No widow who may have been legally divorced or separated from her husband for adultery, or who has been deserted by her husband, or who has quitted his protection, though not divorced or separated, or whose husband's decease, may be living in a notorious state of incontinence, and no female orphan living in such a state shall be entitled to receive, or continue to receive, any pension under these rules.

SECTION IV.—RATE OF EXCHANGE FOR PENSIONS.

692. (a) The pension of a Pilot who was in the service prior to the 30th August 1883, if drawn in England or in the Colonies, is payable at the rate of 1s. 11d. per rupee.

(b) The pension of the family of a Pilot who was in service on the 15th September 1881, if drawn in England or in the Colonies, is payable at the rate of 1s. 11d. per rupee.

(c) The pension of a Pilot or of the family of a Pilot, who was appointed to the service after the dates named in clauses (a) and (b), is payable at the rate of exchange fixed yearly for the adjustment of financial transactions between the Imperial and Indian Governments.

Chapter XXXIV.—Andaman and Nicobar Military Police.

693. (1) The rules in this chapter apply to the subordinate officers, non-commissioned officers and men of the Military Police in the Andamans and Nicobars, including Havildars, Naiks and Sepoys employed in the civil police as Head Constables and Constables.

(2) The term "subordinate officer" includes Subadar-Majors, Subdars and Jamadars.

Leave Rules.

693-A. (a) Privilege leave on full pay may be granted to all ranks as under—

- (i) Two months after thirty months' consecutive service.
- (ii) Three months after thirty-six months' consecutive service.

(b) Such leave, if taken to India, may be overstayed without forfeiture of pay by such period not exceeding eight days as may intervene between the end of the leave and the date preceding that on which the next mail steamer leaves Calcutta for Port Blair.

694. Leave on private affairs on half pay may be granted to all ranks for a period not exceeding six months after five years' continuous service.

695. Leave on medical certificate under Article 336 may be granted to all ranks. During such leave absentee allowances are paid at the following rates—

Sepoys—Subsistence allowance of Rs. 6 a month.

Naiks " " " 8 "

Havildars " " " 10 "

Subordinate officers—Half pay for fifteen months and subsistence allowance of Rs. 15 a month after that term.

696. Extraordinary leave under Article 339 may be granted to all ranks.

697. The total number of men absent from duty at one time on leave other than privilege leave shall not exceed ten per cent. of the Force.

698. Absence from duty while ill in hospital in the Andamans or Nicobars does not interfere with the grant of any leave admissible under this chapter and does not count as such leave. Absentee allowances are granted as follows :—

(a) Subordinate officers The allowances admissible under Article 695.

(b) Havildars, Naiks and Sepoys Full pay

699. (a) Policemen proceeding to India on leave of any description should ordinarily be employed on the voyage in guarding transferred convicts.

(b) On the expiration of their leave, they will report themselves to the Commissioner of Police, Calcutta, with a view to their employment as convict guards on the return journey.

700. Deck passages without diet by sea or river steamer and third class accommodation by rail are granted—

- (a) To the families of subordinate officers for the initial journey to Port Blair on payment of one-third of the passage money and railway fare

- (b) To the families of non-commissioned officers and men who have received permission from the Commandant of the Force to bring their families to the Andamans for the initial journey free of charge.

NOTE—The Commandant's power to give such permission is limited to 10 per cent. of the total strength of non-commissioned officers and men.

- (c) To all ranks proceeding on or returning from leave on private affairs or medical certificate free of charge.

- (d) To the families of all family
to and from his home from
leave of any kind if and on
payment of a single fare for the railway journey.

NOTE—"Family" includes children, one wife and one relative.

Pension Rules.

701. Members of the Force are entitled to pensions under the Regulations in Part IV, for the calculation of ordinary pensions for Superior service. Native officers, Non-Commissioned officers and Sepoys of the Indian Army recruited direct from the Army and whose services are obtained on special application, count their previous Army service as qualifying service under the rules in Part IV, provided they complete 10 years' qualifying service in the Force. Those who retire before completing 10 years' such service are granted the military pension of their rank—their service in the police being included as qualifying under Military rules.

702. Time spent in hospital by Sepoys, Naiks and Havildars of the Force, during which they receive full pay under Article 698, does not qualify for pension.

Travelling Allowance Rules.

702-A. The rules in Part XI of these Regulations apply, with the exception that Jamadars and Subadars are entitled to second class accommodation.

Chapter XXXV.—Assam and Dacca Military Police.

703. Pensions are granted to Policemen and, in the exceptional cases specified in the rules, to their heirs in accordance with Parts IV and VI.

704. Furlough on private affairs on half Assam or Dacca pay for not more than six months, from date of departure from head-quarters to date of return thereto, may be granted by Battalion Commandants on condition that the
ed 5
and

705. Leave on medical certificate for not more than six months, from date of departure from head-quarters to date of return thereto, may be granted by Battalion Commandants to all ranks. A man taking such leave forfeits his turn for furlough and his name is placed at the bottom of the furlough roster. Leave on medical certificate for a longer period than six months may

be sanctioned by the Inspector-General of Police, but the amount of leave which may be granted with pay at one time is limited to two years.

[706. Allowances on leave on medical certificate are full pay for as long a time as the man is entitled to privilege leave, and half pay for the remainder of the first six months; and, in case of extension being granted, half pay. The leave allowance of a man on leave on medical certificate taken in extension of furlough is half Assam or Dacca pay.

707. Sick leave on full pay for a period not exceeding one month may be granted by Battalion Commandants to all ranks while in hospital. In exceptional cases, *e.g.*, in consequence of wounds received in action or for other special reasons, this privilege may be extended to two months under the special sanction of the Local Government. After this period, such leave may be granted on half pay. Leave granted under this rule shall not interfere with the grant of ordinary leave on medical certificate.

708. The Battalion Commandant may grant privilege leave on urgent private affairs under the rules in Chapter XII to men whose conduct has been good.

709. The Inspector-General of Police may frame subsidiary rules not inconsistent with these rules for the guidance of Battalion Commandants in granting furlough and leave.

710. Native Commissioned officers are entitled to travelling allowance as second class officers for journeys by rail and by river steamer.

710A. Officers and men proceeding to or returning from outpost duty are allowed free passages by rail, river and road for their families. In the case of journeys by road, where carts cannot be used, the cost of one cooly for wife and one cooly for children may be allowed

711. Free passages by steamer and rail are allowed—

- (a) to and from their homes, to men proceeding on or returning from furlough on private affairs or leave on medical certificate, but not to men proceeding on or returning from privilege leave;
- (b) to their homes, to men who are not natives of the Province when retiring on Invalid pensions, but not to men granted Retiring or Superannuation pensions.

712. Any member of the force belonging to races foreign to Assam or Dacca who may be recruited outside the Province, may, with the written permission of the Battalion Commandant, and if quarters are available in the Police lines, bring his children, one wife and one relative to Assam or Dacca.

reckoned on the number of foreigners only.

Return passages to their homes will be granted to the families of such officers and men dying in Assam or Dacca.

Chapter XXXVI.—Calcutta and Suburban Police Forces.

713. The leave of absence and acting allowances of officers and men of the Calcutta and Suburban Police Forces, whose pay does not exceed Rs. 20 a month, are regulated by the following rules:—

(1) One month's leave may be granted at any time, but without pay; such leave may only be granted in special cases, and when good ground exists for granting the indulgence.

(2) One month's leave may be granted after eleven months' actual service without deduction of pay.

(3) Special leave for four months may be granted on half pay to any officer or constable who has served for four years without taking leave of any description whatsoever.

(4) Officers and constables whose homes are more than 400 miles from Calcutta may in special cases have the leave, granted under rule (3), extended to five months, and those whose homes are more than 800 miles from Calcutta to six months.

(5) Sick leave may, at any time, be granted for one month on full pay.

[6] Sick leave on production of a certificate signed by the Police Surgeon declaring such leave to be absolutely necessary, may be granted for four months on half pay. [The longer periods granted to men, whose homes are more than 400 and 800 miles from Calcutta, in Rule (4), may be also granted to applicants under this rule.]

(7) Leave granted under Rules (1), (2), (3) and (4), cannot be claimed as a right, but may be granted at the discretion of the Commissioner of Police, provided that no inconvenience to the public service will be occasioned, and that the funds admit.

(8) The place of any officer or constable absent from duty on leave, under Rule (3), (4), or (6), may be filled up by the temporary promotion of a substitute from the next lower grade, whose place again may, in like manner, be filled up by promotion from the lower grades.

(9) Any officer or constable acting for another absent from duty under Rule (3), (4) or (6), shall draw half his own salary *plus* half that of the superior officer for whom he is acting, and any saving accruing from such arrangement shall be carried to the credit of the Leave Fund.

(10) The half salary of any officer or constable on leave, whether special or on medical certificate, will be payable only on return to duty. Should the absentee not rejoin upon the expiration of the leave granted to him, he will be liable to forfeit all claim to the half pay he would otherwise receive upon return. All sums thus forfeited are to be carried to credit of the Leave Fund.

(11) The number of men allowed to be absent on Special leave is not to exceed 10 per cent. of the effective numerical strength.

Chapter XXXVII.—Burma Military Police.

714. The rules in this Chapter apply to—

(a) All members of the Burma Military Police who originally enlisted on an engagement under the direct orders of the Government of India, and on a renewal of their engagement, to all members who joined the Force from the Army prior to 1st January 1889.

(b) All members of the Burma Military Police enlisted by the Government of Burma.

(c) Soldiers who join the Force from the Native Army after the 31st December 1888, or who, having joined before that date, are now serving in Lower Burma, not having been transferred from Upper Burma in the interests of the public service.

(d) Karen recruits

(e) All members not being soldiers of the Native Army on renewal of their engagements who were enlisted under the direct orders of the Government of India.

(f) Kachins enlisted in the Military Police.

(g) Salutries and Armourers.

Leave and Leave Allowances.

715. Furlough on private affairs on half Burma pay [except for members mentioned in Article 714 (a) who will draw full Burma pay] for not more than six months may be granted by Battalion Commandants on condition that the number absent on furlough and sick leave at any one time does not, except under the special orders of the Government of India, exceed $7\frac{1}{2}$ per cent. of the strength of the Battalion.

716. Leave on medical certificate for not more than six months in the first instance may be granted by Battalion Commandants to all ranks. Extension of such leave on medical certificate beyond this period may also be sanctioned by them; but the amount of leave which may be granted with pay at one time is limited to two years

NOTE.—[A man taking leave on medical certificate forfeits his turn for furlough and his name is placed at the bottom of the furlough roster]

717. (a) Allowances on leave on medical certificate are :—

(i) In the case of the members mentioned in clause (a) of Article 714, full Burma pay for the first six months and afterwards at the rate of one quarter the Burma pay: Provided that the Local Government may in any case by special order direct that a man on leave on medical certificate after the first six months shall draw any allowance not exceeding one-half the Burma pay.

(ii) In the case of the members mentioned in clauses (b) to (g) of Article 714, half full Burma pay for the first six months and, in case

of extension being granted, not more than one-fourth full Burma pay without the sanction of the Local Government.

(b) The leave allowance of a man on leave on medical certificate taken in extension of furlough is one-fourth full Burma pay.

NOTE 1.—[An advance of three months' pay may be made to the men mentioned in Article 714 (a), going on sick leave. A man who obtains an advance of three months' pay is not eligible for another remittance for four months.]

NOTE 2.—[The language allowances, or extra pay, of Military Policemen for passing examinations in Yunnanese, Burmese, Shan, Chin and Kachin are treated as salary for the purpose of calculating leave allowances, but are not taken into account in calculating pension.]

718. Sick leave on full pay for a period not exceeding two months may be granted by Battalion Commandants to all ranks while in hospital in Burma and on half pay for any period in excess of two months. Sick leave on full pay may, however, be granted to all ranks while in hospital in Burma on account of wounds received in action until they are discharged from hospital. Leave granted under this rule does not interfere with the grant of leave to India on medical certificate.

719. Battalion Commandants may grant privilege leave on urgent private affairs under the rules in Chapter XII to men whose conduct has been good.

720. The Inspector-General of Police may frame subsidiary rules not inconsistent with these rules for the guidance of Commandants in granting furlough and leave.

Travelling Allowance.

721. Subadars and Jamadars of the Military Police both in Upper and Lower Burma are entitled to second class accommodation on all journeys by rail for which they are entitled to travelling allowance.

722. Free passages by sea, river and rail are allowed to and from their homes to men [except those mentioned in Article 714 (f) unless they belong to the Myitkyina Battalion having been recruited from the Bhamo district and travel *via* Katha] proceeding on or returning from furlough on private affairs or leave on medical certificate, but not to men proceeding on or returning from privilege leave unless the privilege leave is commuted into furlough or leave on medical certificate, when the grant of free passages or the cost thereof will be admissible.

NOTE 1.—[Charges for conveyance by road of Military Policemen proceeding on sick leave may be paid in cases where the Civil Surgeon certifies that they are unable to proceed on foot.]

NOTE 2.—[A free passage is allowed to an attendant who may be detailed by the Battalion

should only be sent when it is thought absolutely necessary to do so, and that ordinarily the invalid should be put in charge of a comrade proceeding on leave at the same time.]

723. Free passages from the place of enlistment may be granted to Karen recruits who have to travel by rail or steamer to the headquarters of their Battalion. The passage of recruits for the Upper Burma Military Police enlisted in India as well as of gunkahars, cooks, bhusties, and transport drivers

is paid by Government from the place of enrolment to the headquarters of the Battalion.

The passages of followers enlisted in Burma for the Upper Burma Military Police may be paid with the sanction of the Inspector-General of Police, from the place of enrolment to the place where the follower is to be employed, in cases where the distance between the two places exceeds 50 miles.

Each recruit for the Arakan Hill Tracts, Lower Burma Military Police, is entitled to the actual cost of the journey from his home to Calcutta; and also free passage to Akyab.

The passage by rail and steamer of recruits enlisted in India for the Lower Burma Military Police is also paid by Government from the place of enrolment to the headquarters of the Battalion.

Police who are discharged on the termination of their engagements may be given travelling allowance under Article 1132, Civil Service Regulations.]

724. Any member of the Force [except those mentioned in clauses (d), (f), and (g) of Article 714] may, with the written permission of the Commandant and, if quarters are available in the Police lines, bring his children, one wife, and one relative to Burma.

For the conveyance of families, third-class passages will be given by railway, and deck passages by steamer, in the case of all Native Officers, on payment of one-third of the passage money and fare; in the case of 20 per cent. of the Non-Commissioned Officers of each Battalion, free of charge; in the case of 5 per cent. of the privates of each Battalion, free of charge. Return passages to their homes will be granted to the families of officers and men dying in Burma.

725. No travelling allowance may be given to families of men of the Karen (now Lower Chindwin) Battalion who have been ordered on service. Indigenous Battalions are raised to avoid such expenses.

Pensions.

726. The following rules regulate the pensions of members of the Burma Military Police mentioned in Article 714 (a):—

(a) Soldiers joining the Police may elect to remain under military rules for pension. In that case no deductions from pay will be made on account of pension, and the pensions are regulated as if the soldiers held Army rank as shown below:—

- | | |
|---|---------------|
| 1. Native Officers in receipt of Ra. 100 to Ra. 150 | as Subadars. |
| 2. " " " Ra. 50 to Ra. 65 | as Jemadars. |
| 3. Native Non-Commissioned Officers | as Havildars. |
| 1. Privates | |

(b) If on joining the Police they do not elect to remain under Military Pension Rules, a deduction from pay of one-half anna in the rupee shall be made : the previous service in the Army qualifies for pension under the Civil Service Regulations, and the pensions admissible are determined by rules of those Regulations applicable to policemen. If the soldier returns to the Army from the Police, the amounts deducted are refunded and the Police service counts towards Army pension.

(c) In the case of policemen who elect for Military Rules, the claims of heirs to pension are regulated by Military Rules, and in the case of those who elect the rules of the Civil Service Regulations, heirs can claim pension only in the special cases provided for in Chapter XXXVIII.

(d) Men who joined the Force, otherwise than from the Army, are only entitled to such pensions and on such conditions as the Civil Service Rules for Policemen permit.

(e) Service in Burma is held to be " Foreign Service " within the meaning of Article 1062 of the Army Regulations, India, Volume I, in case of all men of the Native Army not being Natives of Burma, and is, therefore, so considered in the case of all men of the Upper Burma Military Police subject to the Military Pension Rules of the Native Army.

727. (a) In the case of members of the Burma Military Police mentioned in clauses (b) to (g) of Article 714, the rules in the Civil Service Regulations apply as regards pensions, except Salutries and Armourers who joined the Upper Burma Military Police from the Army before the 1st January 1889 who are subject as regard pensions to Article 726, clauses (a) to (c).

(b) Pension under the Civil Rules for the period of their past Military as well as their Police service is granted to the Native Officers and Non-Commissioned Officers of the Burma Military Police referred to in clause (a) who have been or may be recruited direct from the Army after 1888, when volunteering was closed, on the condition that they complete 10 years' qualifying service in the Burma Military Police in addition to their service in the Army ; but those who retire with less than 10 years' qualifying service in the Burma Military Police will be granted pension on the Military scale according to their rank for the whole period of their service, that in the Police being included. *This concession applies only to those men whose services were obtained from the Army on special application*

PART VI.—WOUND AND OTHER EXTRAORDINARY PENSIONS.

GENERAL ARRANGEMENT.

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PART VI.—WOUND AND OTHER EXTRAORDINARY PENSIONS.

Chapter XXXVIII.—Wound and other Extraordinary Pensions.

SECTION I.—WOUNDS ON MILITARY SERVICE.

728. Gratuities and pensions to officers wounded, and to the families of officers killed, in action, or in the execution of duty otherwise than in action, and to the families of officers whose death is due to illness contracted on service with an army in the field may, in cases in which, under the Army Regulations, India, they would be admissible to the officers or men of the Regular Forces or to their families, be granted under the following rules, the grant being reported to the Secretary of State.

NOTE.—[In a case falling clearly and strictly within the letter of the rules, the Local Government may grant the pension admissible, the report to the Secretary of State being made through the usual channel.]

729. Officers of Government, being Volunteers who are called out on actual Military service, are entitled (themselves and their families) to the pensions, allowances, or gratuities admissible under Army Regulations, India, Volume IX, Section XIX : Provided that, if any such officer is wounded or killed in such actual Military service, and he or his family are in consequence thereof, entitled by the following rules or by the rules of the Service to which he belongs, to a higher pension, allowance or gratuity than is provided by the Military rules above referred to, then he or his family shall receive such higher pension, allowance, or gratuity in lieu of that provided by those rules. : Provided also, in every case, that he has given to the head of his office if he is a member of an office establishment, or to his superior officer in other cases, notice of his having been called out.

730. Gratuities and pensions are granted to Civil officers wounded and to the families of such officers killed, while serving (in circumstances justifying their presence) with a Military force, and to the families of such officers whose death is due to illness contracted on service with an army in the field, according to the scale applicable to officers or men of the Army or their families, the rank of the officers being determined with reference to the actual

Military rank in the field or by the following tables, whichever is more favourable to the recipients:—

(i) Members of the Indian Civil Service:—			(ii) Other Civil officers, not being native officers:—		
An officer of—		Ranks as a—	An officer whose salary is—		Ranks as a—
Less than 5 years' standing		Lieutenant.	Below Rs. 16 a month		Sepoy.
More than 5	"	Captain.	" Rs. 16 a month or upwards		Naik.
" 12	"	Major.	" 25	ditto	Havildar.
" 18	"	Lieutenant-Colonel.	" 50	ditto	Jemadar.
" 23	"	Colonel.	" 100	ditto	Subadar.
" 31	"	Major-General.	" 200	ditto	Lieutenant of less than 11 years' service.
Lieutenant-Governor or Chief Commissioner		Lieutenant-General.	" 300	ditto	Lieutenant of more than 3 years' service.
			" 500	ditto	Captain.
			" 1,000	ditto	Major.
			" 1,500	ditto	Lieut.-Col.
			" 2,000	ditto	Colonel.
			" 2,500	ditto	Major-General.

(iii) The wound and family pensions of native Civil officers are fixed in rupees as follows:—

An officer whose salary is	Wound pension.	FAMILY PENSION.				Maximum amount of pension admissible.	
		INTERMEDIATE RATE		HIGHEST RATE.			
		For widow.	For each child.	For widow.	For each child.		
		Rs.	Rs.	Rs.	Rs.		
Below Rs. 16 a month		The rates are determined in accordance with Army Regulations, India, Volume I, officers ranking as in clause (ii) above					
Rs. 16 a month or upwards							
" 25 ditto		80	60	12	80	16	Half the salary of the officer.
" 50 ditto		120	90	18	120	24	
" 100 ditto		240	120	24	180	36	
" 200 ditto		360	150	30	225	45	
" 500 ditto		360	180	36	270	54	
" 1,000 ditto		420	210	42	315	63	

(iv) A Viceroy of India or Governor of a Presidency ranks as a Field Marshal, General, or Lieutenant-General Commanding-in-Chief.

(v) A person who is not in the service of Government ranks according to his status in life as compared with an officer of the Regular Forces.

Place of payment.

731. A Civil officer in receipt of a wound pension cannot draw it from the Home Treasury while serving or residing in India, but must draw it at the place where his pay, absentee allowance, or pension is disbursed.

SECTION II.—SPECIAL CASES.

732. In special cases, as, for instance, when an officer is wounded in an encounter with dacoits, the Government of India may relax the condition of Article 730 as to service with a Military force. In such cases the pension or gratuity granted to a Civil officer will be calculated according to the scale laid down in the Army Regulations, India, Volume I, for wounds and injuries received in the execution of Military duty otherwise than in action, the rank of the Civil officer being determined as in Article 730.

Grant Pension.]

Wound Leave.

733. An officer compelled to absent himself from duty, in consequence of wounds received in action, or of illness contracted by active service in the field (in circumstances justifying his presence) with a Military force (i.e., service recognised as such by the Government of India), or of illness which was originally contracted on such service, being aggravated or reproduced by subsequent service of a similar nature, may be allowed extraordinary leave on medical certificate, irrespective of the period which has elapsed since his last return from leave of any description. Such leave will not reckon as part of the maximum admissible under general rules, and it will, except as regards the earning of Furlough, count, up to a maximum of 12 months as active service, provided that—

- (a) it must be taken immediately in consequence of the wound or illness, i.e., without any intervening period of active service,
- (b) it is certified by the Medical Board, before which the officer appears, that the disability owing to which leave has become necessary, originated on active service in the field and was solely caused by hardship and exposure undergone or by wounds received, during such service;
- (c) it cannot be combined with any other kind of leave, except Leave on Medical Certificate;

- (d) allowances during such leave will be half average salary, subject to the maxima applicable to ordinary Furlough, and no allowances will be paid for any leave in excess of two years ;
- (e) the medical certificate must state the term for which leave is necessary in consequence of the wound or illness, and any extension of that period can be granted only on a fresh medical certificate ;
- (f) an interval of three years must intervene between expiry of such leave and furlough, except in the case of furlough on medical certificate, when the interval need not exceed six months.

such service.]

SECTION III.—INJURIES RECEIVED ON DUTY.

734. (a) The rules in this Section are analogous to the Regulations for the grant of pensions to soldiers wounded in action and to the heirs of soldiers killed in action and provide for a pension or gratuity in cases of injury or death :—

- (i) to a man so injured in the execution of a public duty as to be incapacitated for earning a livelihood ;
- (ii) to the family of a man killed in the execution of a public duty ;

(b) They apply to any person employed in the service of the Government, whether permanently, temporarily, or even casually, and when remunerated by fixed pay, or (as, for example, miners in the Salt mines) for piece-work.

(c) They apply also to a village watchman (including a Municipal chowkidar in the United Provinces) or his family, even though he receives no pay from the State

735. A Wound or Extraordinary pension or gratuity is granted only when injury or death is met in the performance of a duty which is attended with extraordinary bodily risk. This condition governs the grant of pensions or gratuities under Articles 739 and 740. The Government recognises no claims on account of loss of life or bodily injury resulting from an ordinary accident. The following are examples of cases of ordinary accident :—

A Policeman falling from a horse ; a Policeman on escort duty killed by sunstroke ; a Lascar killed by the snapping of a hawser ; a Labourer falling under a burden.

NOTE.—[As this rule is based upon the analogy of the regulations for the grant of pensions

736. The Government does not bind itself to grant pension in every case, or, if it grants pension, to grant it for life.

737. The amount of pension is to be regulated by —

- (i) the character and service of the injured or killed ;

NOTE.—[The term "family" includes only wife, legitimate child, father or mother, dependent upon the deceased for support. The words "for the support of the family" should be inserted in every order sanctioning a pension under this rule.]

741. (a) A pension granted under clause (i) or (ii) of the preceding Article will, unless the pensioner is more than sixty years old (in which case it will be permanent), continue, in the first instance, for two years only.

(b) At the end of eighteen months, the pensioner shall be examined afresh by a Medical Officer in charge of a Civil station, upon whose report the Local Government will decide whether the pension shall be continued or not for a further term, or permanently, and whether the pensioner shall be subjected or not to further medical examination.

742. (a) If a pension is granted to a family under Article 740 (iii), it

■ unmarried

daughter, for the same purpose ;

(iii) these failing to the father, for the same purpose ;

(iv) and failing all others, to the mother for the same purpose.

(b) To a male, pension is given as follows —

(i) if the pensioner is under six years of age, till he is eighteen years old ;

(ii) if above six and under fifty years, for twelve years ;

(iii) if not under fifty years, for life.

(c) The pension to a female is for life or until marriage ; (1) but, on her suitable marriage, the Local Government, may at its discretion, grant her five years' pension as a dowry.

(d) A pension is given to only one member of each family, and no transfer of the pension to another member is permitted on its lapse either by the demise of the pensioner or for any other reason, or on its remaining in abeyance under the operation of the rules in Chapter XXI.

743. The Government of India have also the power to grant in any case, even where no pension or gratuity is admissible under these rules—

(a) a gratuity not exceeding Rs 1,000 ; or

(b) when injury or death is due to devotion to duty, a pension not exceeding Rs. 25 a month or a gratuity of equivalent amount.

NOTE.—The powers of the Government of India under clause (a) above may be exercised by the Railway Board in the case of Railway servants.

744. A Local Government may, as a special case, grant a gratuity not exceeding Rs. 20, or two months' pay, whichever is less, to a day-labourer or mechanic injured, or to his representatives if he is killed, in the execution of duty by causes beyond his control, if the injury is not such as to allow of a Wound or Extraordinary pension being granted under the foregoing rules.

NOTE.—[The powers of a Local Government under this Article may be exercised by Superintending Engineers in the Public Works Department.]

SECTION IV.—STATE RAILWAY RULES.

745. A Local Government having State Railways under its control and Managers of State Railways not under Local Governments may grant a gratuity to any State Railway servant who may be injured, or to the representatives of any State Railway servant who may be killed, by the working of trains or engines, otherwise than through his own negligence or wilful action : provided that such gratuity shall not exceed a sum equal to six months' pay of the servant injured or killed, or a maximum of Rs. 200. If Rs. 200 is considered insufficient, a reference must be made to the Government of India.

1. Officers of the Railway and Signal Companies are eligible in the same way as State Railway servants.

Managers of State Railways in respect of State Railway servants.

SECTION V.—PROCEDURE.

746. When a claim for Wound or Extraordinary pension arises, the head of the office in which a man killed or injured was employed must hold a formal inquest, taking evidence as to—

- (i) the circumstances under which the injury was received, or the life lost ;
- (ii) the relationship (in the case of a death) and the pecuniary circumstances of the claimants.

747. The head of the office will then submit the case, with a statement of the circumstances, through his official superiors, to the Government. The application, which should be in Form No. 25 in the case of a man injured and Form No. 22 in the case of a man killed, should be accompanied by the report of the Audit Officer upon the claim.

SECTION VI.—RE-EMPLOYMENT OF WOUND PENSIONERS.

748. A Wound or Extraordinary pension granted under these Regulations, or under Military Rules to a Native Commissioned officer or a Non-Commissioned officer or soldier for wounds and injuries, may, in the event of the pensioner's subsequent employment in the Civil Department, be, during such employment, reduced or suspended by the Government which granted the pension.

NOTE.—[“The withdrawal of pension is optional with the Local Government, and it should not be withdrawn except in cases of complete recovery.”]
 GOVT. N. O. 1348, dated 13th September 1873.]

749. If, however, the Wound or Injury pension of a Native Commissioned officer or a Non-Commissioned officer or soldier includes an Invalid pension, he may, if the Wound or Injury pension is withheld, draw the Invalid pension in addition to Civil salary.

PART VII.—FOREIGN SERVICE; REGULAR ESTABLISHMENTS THE COST OF WHICH IS RECOVERED BY GOVERNMENT; SERVICE UNDER LOCAL FUNDS.

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PART VII.—FOREIGN SERVICE; REGULAR ESTABLISHMENTS, THE COST OF WHICH IS RECOVERED BY GOVERNMENT; SERVICE UNDER LOCAL FUNDS.

Chapter XXXIX.—Foreign Service.

Extent of Application.

749A. The revised rules in this Part will apply only to cases in which officers are transferred to Foreign Service after the 1st August 1913. In the case of officers transferred to Foreign Service before this date, the old rules contained in the original/fifth edition of these Regulations should continue to be applied.

749B. It is to be understood that, unless the Local Government is expressly given authority to make exceptions, all deviations from the Foreign Service Rules require the sanction of the Government of India, whose powers in this respect remain unaltered.

Definition.

750. Foreign Service is of two kinds, viz. —

First.—The service of an officer transferred to service under an employer who is not under the orders of Government and is allowed while in such service to maintain his claim to pension or to leave and pension in the same way as if he were still in the service of Government.

Examples.—Officers lent to Egypt, to a Native State, a Railway Company, a Port Trust, a Municipality, a District Board or other Local Fund

Second.—The service of an officer employed in connection with the management by Government of estates or funds which they have taken under their control or received in trust, and paid from the revenues of such estates or from such funds. The service must be strictly connected with the management by Government, and appointments existing apart from, or continuing after relinquishment of, Government control can be made only under the conditions of foreign service of the first kind.

Examples.—Administrators of Native States under direct management, Managers of Courts of Wards' Estates.

General Conditions applicable to Foreign Service.

751. An officer transferred to foreign service remains subject to the general and disciplinary rules which would have applied to him as a servant of Government had he not been so transferred

752. An officer who belongs to a graded service is allowed the substantive promotion which he would have received had he not been transferred. One who does not belong to a graded service may not, without the sanction of the Local Government by which he was transferred, be given substantive

Sanction to Transfer to, and Pay in, Foreign Service.

762. Transfer to foreign service is not permissible :—

- (i) unless the transfer is in the public interest, that is, the service is such as should, for public reasons, be rendered by a servant of Government;
- (ii) unless the officer holds, when his transfer is effected, an appointment in qualifying service on an establishment paid from General Revenues.

NOTE.—[Service under a landholder who retains the management of his own estate or under such a body as the Society for Prevention of Cruelty to Animals, or under societies for

secured which would otherwise be unattainable]

763. Transfers and appointments may be sanctioned by the Local Government under which the officer is serving, provided (a) the transfer is to foreign service in India, (b) the officer's pay in foreign service does not exceed Rs. 2,500 a month if he belongs to an Imperial service (Article 29 B), and in other cases Rs. 1,250 a month, and (c) the officer has rendered five years' service qualifying for pension. Condition (c) may be relaxed by the Local Government* under which the officer is serving at the time of the transfer; it does not apply to the following officers :—

- (i) Officers subject to the leave rules in Chapter XIII and officers of the Army and the Royal Indian Marine.
- (ii) Employés in the Survey, Forest, Medical, Veterinary and Agricultural Departments with technical qualifications.
- (iii) Officers transferred to foreign service of the second kind.
- (iv) Officers transferred to temporary appointments.

* NOTE.—[Local Governments should be on their guard against endeavours to use the service of Government merely as a means of entrance with pensionable status into foreign service.]

1. Temporary appointments are those which last not more than six months. In judging whether an appointment falls within this class, the duration of the appointment should be considered, not the duration of the particular officer's employment.

2. The Local Government may by general or special order—

- (a) delegate to any authority subordinate to it power to transfer to foreign service within the province any officer whom such authority can, without reference to higher authority, appoint or transfer in the ordinary course of administration;
- (b) delegate power to sanction transfers to temporary appointments outside the province.

3. The Government of Madras is empowered to transfer to service in Ceylon without a reference to the Government of India any officer not belonging to an Imperial service.

764. Pay and allowances in foreign service in India may be fixed within the limits specified in Article 763 by the authority sanctioning the transfer. The latter should in doing so be guided by the following general principles which should only be departed from for very special reasons, to be duly recorded :—

- I.—The pay of an officer transferred to a post, the duties of which are similar to those of the appointment which he held when trans-

ferred, should be fixed at a sum which does not exceed by more than 25 per cent. his last pay in British Service, or, if he is acting in a grade or appointment from which he is unlikely to revert, his last salary.

II.—An officer transferred to an unusually responsible or difficult post or to one the duties of which differ from those of his appointment under Government, should receive pay specially fixed with reference to his status and pay in the service of Government, and the nature of the work for which he is transferred.

III.—When the transfer is to a Native State, the Local Government may allow the officer concessions not exceeding those specified in Rule II of Appendix 31. This rule is absolute and Local Governments are not empowered to allow greater concessions. In other cases, officers may be allowed travelling and conveyance allowance on such scale as the Local Government considers adequate; no other kind of allowances should ordinarily be sanctioned as they should be allowed for in fixing the pay of the officers in foreign service. In special cases in which the Local Government considers them necessary, exchange compensation and local allowances may be sanctioned, subject in the former case to the provisions of Article 41-G of the Civil Account Code, as also the payment of leave and pension contributions by the foreign employer, the value of these concessions being taken into account in fixing the pay of the officers in foreign service.

IV.—Increases of pay should be regulated as follows :—

- (a) An officer, whose pay is fixed under rule I and who belongs to a graded service or who is on progressive pay or in a service in which pay is regulated by a time-scale, may on the occasion of each substantive promotion on his departmental list, or accrual of a periodical increment, be granted an increase equal to that which such promotion or increment would have given him in British service *plus* a sum not exceeding 20 per cent. thereon.

NOTE.—[When an officer in foreign service would have obtained, had he remained in British Service, acting promotion from which he would not have been likely to revert, his salary may be raised, with the consent of the foreign employer, to the amount which he would have drawn if he had remained in Government employ.]

- (b) In all other cases in which pay is fixed under rule I, and in all cases in which it is fixed under rule II, no increase should ordinarily be allowed until the officer has been for three years in foreign service. After that period, and subsequently at intervals of not less than three years, increments of not more than 20 per cent. of the original pay may be allowed, if proposed by the foreign employer and if, in the opinion of the authority by whom the transfer was sanctioned, they are justified with reference to the work of the officer and the nature of his duties.

- (c) In the event of a material change in the nature of the duties of an officer in foreign service his pay may be revised within the limits of its powers of sanction by the authority who sanctioned the transfer.

Contributions required for Leave and Pension.

765. (a) An officer transferred to foreign service in India contributes for both leave allowance and pension; if the transfer be to service out of India, contribution is made for pension only.

(b) Contribution is payable during leave on account of an officer who contributes for pension only. When contribution is paid for both pension and leave allowances it is payable during privilege leave taken in foreign service but not during other kinds of leave.

766. In the case of an officer in *foreign service of the first kind* contributions for leave allowance and pension are levied on an assumed pay, in return for which the Government accepts the charge for the officer's leave allowances (all kinds and pension (or, in the case of foreign service out of India, pension only), calculated on such pay. (As regards privilege leave allowances, see article 779 below.)

767. In the case of an officer of any of the classes mentioned in Article 33 (i) pay is assumed to be as follows whatever the actual pay and allowances drawn by him in foreign service may be:—

(a) If the officer is on a time-scale of pay, the pay which he would have drawn from time to time had he remained in British service.

(b) For officers who are not on a time-scale of pay:—

Indian Civil Service	Other Services.
Rs	Rs
400	350
100	50

Assumed pay whether calculated according to clause (a) or (b) of this article is subject to the following maxima; Rs. 2,500 a month in the case of a member of the Indian Civil Service, or a Military officer subject to the Civil Leave Rules; Rs. 1,750 in the case of a Military officer subject to the Indian Army leave rules, and Rs. 2,000 a month in the case of any other officer subject to the rules in Chapter XIII: provided that except in the case of whose special shall not exceed Rs. 1,500 a month.

Exception—In the case of an officer promoted from a subordinate grade to service which is subject to the leave rules in Chapter XIII assumed pay is the pay he would draw from time to time on the Government list to which he belongs.

768. In the case of officers other than those mentioned in Article 763 (1), assumed pay is either the pay last drawn in Government service, or, if the officer belongs to a graded service, or is on a progressive or time-scale of pay, that to which he has attained or been promoted in accordance with the rule in Article 752, up to a maximum of Rs. 1,250 a month.

769. In the case of an officer in foreign service of the second kind contributions for leave allowance and pension are levied on actual sanctioned salary, subject to the maxima prescribed in the case of assumed pay in Articles 767 and 768. In return for these contributions the Government accepts the charge for the officer's leave allowances of all kinds and for his pension calculated on sanctioned salary.

770. Contribution is levied at the following rates :—

	For pension and leave allowance.	For pension only.
(a) In the case of officers of the classes mentioned in Article 763 (1)	$\frac{5}{16}$ %	$\frac{1}{2}$ %
(b) In the case of other gazetted and non-gazetted officers.	$\frac{1}{2}$ %	$\frac{1}{2}$ %
(c) In the case of inferior servants		$\frac{1}{16}$ %

ployer]

NOTE 2.—[Percentage deductions (e.g., Civil Fund in the case of a member of the Indian Civil Service) are calculated upon "assumed pay" in foreign service of the first kind and upon actual sanctioned salary in foreign service of the second kind.]

NOTE 3.—[In the case of a Military officer the contribution covers the liability of Indian Revenues for temporary half-pay or half-pay pension when an officer loses his health during foreign service out of India before becoming entitled to ordinary so-called full pay pension.]

NOTE 4.—[The Chairman and Deputy Chairman of the Bombay Port Trust and the Chairman, City of Bombay Improvement Trust, contribute for pension only at the rate of $\frac{1}{4}$ th of assumed pay, their leave allowances for such leave as has been earned in its service being paid by the Trust.]

* NOTE 5.—[The Government of India pay no leave allowances to inferior servants transferred to foreign service.]

NOTE 6.—[Contributions in respect of Indian troops warrant and non-commissioned officers and men of the army departments, etc., sent for service out of India are regulated by separate orders.]

771. In addition to the contribution prescribed in these rules subscribers to the following pension funds pay to Government an additional premium of $\frac{1}{4}$ th or $\frac{1}{8}$ th of the premium paid to the Fund—

- (i) Bengal Uncovenanted Service Family Pension Fund . . . one-fourth.
- (ii) Bombay Uncovenanted Service Family Pension Fund—
 - (1) Subscribers who joined the fund on or before the 12th November 1900 . . . one-fourth.
 - (2) Those who joined after that date . . . one-sixth.
- (iii) Bengal and Madras Service Family Pension Fund . . . one-eighth.

NOTE 1.—[In the case of an officer who contributes for leave, the extra premium is not payable during leave]

NOTE 2.—[Subscribers to the Uncovenanted Service Family Pension Funds transferred to service under a local fund which qualifies for pension payable from the local fund, must, while employed under the local fund, pay the additional premium prescribed in this Article]

NOTE 3.—[The premium when due from subscribers to the Bengal Fund, is collected by the Directors of the Fund and adjusted in communication with the Comptroller, India Treasury.]

Remission of, and Exemption from, Contribution.

772. (a) The Local Government may remit contribution for any period for which an officer in foreign service is temporarily employed under Government, on duties additional to or distinct from his duties in foreign service.

(b) The following classes of officers are exempted from the payment of contribution under the above rules, and their pensions [and, in cases (ii) to (v) leave allowances] are calculated according to the rules applicable to Government servants :—

- (i) Officers lent to His Majesty's Government or to British Colonies, Protectorates, etc. In such cases, if the loan is to the War Office, a share of the pension ultimately granted to the officer is paid by the War Office under separate arrangements, but if it is to a British Colony or Protectorate, pension contribution is paid during the period of the loan by the employing Government either to the Government of India, or to the India Office. When, however, an officer is allowed to take up duties under the War Office, he may in certain circumstances be required to pay a pension contribution in respect of the period of the loan.
- (ii) Subordinates in the Revenue Survey temporarily lent to Municipalities for duty which, though paid for by them, also promotes Imperial interests.
- (iii) Medical officers lent to charitable dispensaries or hospitals in British India. In any province, however, in which the changes in the conditions of service of Assistant Surgeons authorised by the orders in Home Department Resolution No. 1148-50, dated 22nd August 1898, have been brought into operation, contribution must be paid under the ordinary rules.
- (iv) Officers of the Royal Indian Marine lent to Port Trusts.
- (v) Any other officer or class of officer, who by the specific orders of the Government of India, has been exempted from the payment of contribution.

Procedure for Payment of Contribution.

773. A copy of the orders sanctioning an officer's transfer to foreign service must always be communicated to the Account Officer (referred to in

Article 774) by the authority by whom the transfer is sanctioned. The officer himself should, without delay, communicate a copy to the officer who audits his pay, and take his instructions as to the officer to whom he is to account for the contribution; report to the latter officer the time and date of all transfers of charge to which he is a party when proceeding on, while in, and on return from, foreign service; and furnish from time to time particulars regarding his salary in foreign service, leave taken by him, his postal address and any other information which that officer may require.

774. (a) In the case of foreign service out of India, the "Account Officer" is the Comptroller, India Treasuries.

(b) In the case of foreign service in India—

- (1) if salary in foreign service is paid from a Government treasury and is subject to audit by an audit officer of Government, the Account Officer is such audit officer;
- (2) otherwise, the Account Officer is the Accountant-General of the Province in which the Municipality, Port Trust or other body concerned is situated, or in the case of service under a Native State, the Accountant-General of the Government under whose administration the State is.

775. Ordinarily, contribution is payable directly to Government by the transferred officer himself. Government does not enter into arrangement with foreign employers or make direct demands upon them. Exceptions to this rule are:—

- (a) Cases in which officers are lent to His Majesty's Government or to British Colonies, Protectorates, etc., and in which the contribution is payable by the borrowing Government [see Article 772 (b) (i).]
- (b) Cases in which salary is payable at a Government treasury under the orders of the Accountant-General, and contribution is deducted from salary;
- (c) Cases of members of clerical establishments in foreign service of the second kind, in which responsibility for payment of contributions and compliance with the rules rests with the officer who controls the fund or administers the trust;
- (d) Cases in which, by special order or arrangement, contribution is recovered collectively on account of several officers employed under one foreign employer through an agent or officer who represents the employer.

776. Not later than 15 days after the end of each quarter for which salary in foreign service is earned, the officer must remit, in such manner as may be arranged with the Account Officer, the contribution payable by him for the quarter.

In any case in which contribution falls into arrear, the Account Officer should bring the fact to the officer's notice and claim interest at the rate of

4 pias a day per 100 rupees upon the amount due, from the date of expiry of the 15 days to the date on which contribution is paid up.

If any amount due, including interest, is not paid within 12 months of its accrual, the Account Officer should intimate to the officer the amount due up to date, and inform him that in consequence of the default he has forfeited his claim to pension or pension and leave allowance, as the case may be. In order to revive his claim the officer must at once pay the amount due and represent his case to the Local Government who will deal finally with it.

Rules regarding Leave, and the Grant of Leave.

777. An officer holding an appointment in foreign service in India may not take leave or obtain leave allowances from Government unless he actually quits duty and proceeds on leave.

778. An officer on foreign service in India may not be granted leave otherwise than in accordance with the rules of the Government service to which he belongs. If such leave is granted to an officer the Account Officer shall on the fact coming to his notice require the leave so granted to be commuted to the leave for which the officer is eligible under rule, and call upon him to refund any allowances in excess of the amount admissible. The officer himself is personally responsible for the observance of the rule contained in this Article; by accepting leave to which he is not entitled under the rules he renders himself liable to refund allowances irregularly drawn, and in the event of his refusing to refund, to forfeit his previous service under Government, and to cease to have any claim on Government in respect of either pension or leave allowances.

779. An officer in foreign service of the *first kind* in India draws leave allowances calculated on assumed pay, save that in the case of privilege leave he is entitled to his actual pay in foreign service, the difference between such pay and assumed pay being paid by the foreign employer. In the case of foreign service of the *second kind* all leave allowances are calculated on actual sanctioned salary and paid in full by Government.

780. (a) Privilege leave which is certified by the Account Officer (Article 774) to be admissible may, when taken by itself, be granted to an officer in foreign service in India by his employer.

(b) Leave other than privilege leave taken by itself, may, in cases where the transfer has been sanctioned by the Government of India or a Local Government, be granted to an officer in foreign service in India by the Local Government under whom he was serving before his transfer; in other cases it may be granted by the authority who sanctioned the transfer.

(c) An officer who is in foreign service in India should submit all applications for leave, other than privilege leave taken by itself, with the report of the Account Officer, through his employer to the authority competent to sanction the leave.

781. To an officer who is in foreign service out of India leave in respect of his foreign service may, unless special arrangements as to leave have been

made on his behalf by the Government of India or the Secretary of State, be granted by his employer on such conditions as to leave and absentee allowances as the employer may determine. The officer should make himself acquainted with the rules or arrangements which are to regulate his leave before accepting foreign employment, and the Account Officer will be responsible for obtaining from him at the time of transfer a declaration showing that he has read and understood this rule. Time spent by the officer in foreign service out of India, though not constituting an interruption of service for leave under the Civil Service Regulations, does not count for such leave. Leave earned in respect of service under Government before transfer cannot ordinarily be granted to such an officer so long as he continues to be on foreign service.

Special Cases.

782. An officer of the Education Department, who is transferred by the Local Government in the public interest to a non-departmental College or School managed by a Board on which the Local Government is represented, or which is administered under a constitution and regulations approved, and of which the scale of superior appointments is sanctioned by Government, may contribute for leave allowances and pension under these Regulations.

Chapter XL.—Cancelled.

Chapter XLI.

Regular Establishments the cost of which is recovered by Government.

783. When an addition is made to a regular establishment on the condition that the cost shall be recovered from the persons for whose benefit the establishment is created, recoveries should be made under the following rules —

- I.—The amount to be recovered should be the gross sanctioned cost of the service, and should not vary with the actual expenditure of any month.
- II.—The cost of the Service should include the amounts required under Articles 769, 770 to provide for pension and leave allowances; these amounts being calculated on the sanctioned rates of pay of the members of the establishment. The remission of recovery on this account requires the sanction of the Government of India if the cost of the service exceeds Rs. 250 per month.
- III.—If for any period the expenditure incurred, or to be incurred, should be considerably less than the sanctioned cost, the Local Government may reduce the amount of the recovery, the reduction being roughly proportionate to the difference.

NOTE 1.—[In the case of permanent establishments (as also temporary establishments which are filled by men already in permanent Government employ) a part of the cost of which

is recovered from persons or bodies benefited by their service, a demand for leave and pension contributions should be made in respect of the portion of the cost paid by the persons benefited the limit of Rs. 250 a month prescribed in clause II above applying only to such portion]

NOTE 3—[In the case of a member of the Indian Civil Service the contribution recoverable under clause II above, to provide for pension and leave allowances, does not include the 4 per cent. annuity deduction which is payable in addition direct by the officer to the Account Officer.]

NOTE 4—[The contributions for pension and leave allowances referred to in clause II above should be levied at the rates prescribed in Articles 769 and 770 only in the case of establishments sanctioned after the 1st August 1913, the rates in the old rules contained in the original fifth edition of these Regulations continuing to apply in the case of establishments that existed before that date even though the incumbents may change or additions be made to these establishments.]

784 to 795. *Omitted.*

Chapter XLII.—Service under Local Funds.

SECTION I.—PENSIONS.

796. Apart from any special provisions made under the following rules service paid for from a Local Fund does not qualify for pension.

797. In the case of the Local Funds which up to the 1st April 1908 were treated as Incorporated, the Local Government may, subject to any provisions of the Local Fund, the Local Government, the Trustees, Committee, or Managers by itself do so in the case of funds

798. The same procedure should be observed in the calculation, grant and payment of pensions for service treated as qualifying under Article 797, as is prescribed for pensions payable from General Revenues, but the pensions must be paid from and charged against the Local Fund.

NOTE—[See the notes under Article 807.]

799. When part of the pensionable service of an officer qualifies for pension from the General Revenues and part from the Local Funds which up to 1st April 1908 were treated as Incorporated, his pension is paid and charged according to the Rule of Proportions: it is not admissible to disregard the pensionable Local Fund service, and award a pension only for the service paid from General Revenues: Provided that if, under this rule, less than one-fourth of the pension would be payable from either source, no distribution shall be made; in such case the other source shall bear the whole charge.

800. In the case of other Local Funds, the rule that service does not qualify does not prohibit the grant and payment of pensions in conformity with the general terms of the pension rules by the authorised administrators of the Funds. But Government is in no way responsible for the sanction or continuance of such pensions, and no standing order for their payment

may be issued to, or received by, any Government Treasury, and the procedure rules in Part X do not apply to them.

NOTE.—[The restrictions as to the payment of such pensions do not apply to pensions chargeable to the Calcutta Fire Brigade Fund.]

801. Service in the following establishments paid from Local Funds is treated as qualifying, provided that pension for service under the Fund is paid from the Fund, the Rule of Proportions being applied in the case of service paid partly from the Fund and partly from other sources.—

(i) Establishments paid from Port Funds managed by Government.

NOTE.—[The rule regarding officers of the Royal Indian Marine lent to Port Trusts is given in Article 772(b) (iv).]

(ii) Members of the establishment of the Fire Brigade, Calcutta, whose pay at date of discharge exceeds Rs. 20 a month

NOTE.—[The pension of a member of the Fire Brigade who was enlisted on or after 27th December 1905 and whose pay at date of discharge does not exceed Rs. 20, is regulated by Scale B in Article 503 and is paid from the Fire Brigade Fund or from the Fire Brigade Fund and the General Revenues according to the Rule of Proportions as provided above for officers on pay exceeding Rs. 20. The pension of a member of the Fire Brigade who was enlisted before 27th December 1905 and subscribed to Police Superannuation Fund, and whose pay at date of discharge does not exceed Rs. 20 is, on his being invalided, regulated by Scale A in Article 503 and paid from General Revenues, provided he was not a subscriber to the Police Superannuation Fund at the date of his enlistment.]

503 and
Revenues
not Rs. 20]

1. The pension of a member of the Fire Brigade who was enlisted on or after 27th December 1905 and whose pay at date of discharge does not exceed Rs. 20, is regulated by Scale B in Article 503 and is paid from the Fire Brigade Fund or from the Fire Brigade Fund and the General Revenues according to the Rule of Proportions as provided above for officers on pay exceeding Rs. 20. The pension of a member of the Fire Brigade who was enlisted before 27th December 1905 and subscribed to Police Superannuation Fund, and whose pay at date of discharge does not exceed Rs. 20 is, on his being invalided, regulated by Scale A in Article 503 and paid from General Revenues, provided he was not a subscriber to the Police Superannuation Fund at the date of his enlistment.

Pensions from the General Revenues.

802. The administrators of a Local Fund which banks with a Government Treasury may, with the permission of the Local Government, make a permanent arrangement for contributing for pensions from the General Revenues for its permanent employés, or for any specified classes of them, by paying to Government a contribution of one-ninth of the sanctioned salaries of the several appointments: provided that the bills on which the establishment charges are drawn from the treasury are subject to the audit of the Accountant-General under the rules prescribed for the audit of Government establishment charges, and that the contribution is added to the establishment bill and paid from the Local Fund by transfer credit to the General Revenues at the time the establishment bill is cashed. Arrear contributions in respect either of individual officers or classes of officers proposed with a view to render past service qualifying cannot be accepted.

1. The Municipal Corporation of the city of Bombay and the Committees of District Municipalities in the Presidency of Bombay may make a similar arrangement for contribution to pensions from the General Revenues for teachers employed in Municipal Schools, without

enforcement of the conditions of banking with a Government Treasury and of audit by the Accountant-General, provided the Accountant-General is furnished with—

- (1) An annual list of the Establishment of teachers in Civil Account Form No 3 with accompaniment in Form No 4
- (2) Health certificates of all new employees.
- (3) Last-pay certificates of all teachers transferred from other schools.
2. (a) Teachers employed in schools maintained from Local or Municipal Funds in Bombay—
 - (i) who were appointed to Local (not Municipal) Fund service before the 26th June 1882, and on whose behalf contributions were made from Local Funds to the Local Fund Pension Fund : or
 - (ii) who were appointed or transferred from Government Service after the 26th June 1882 (the date the Local Fund Pension Fund was closed to new entrants) and before the 7th January 1889, the date of the new Foreign Service rules, and on whose behalf contributions were specially permitted by the Local Government to be paid to secure a title to pension from General Revenues under the rules in force before 7th January 1889 (see "Note" below), continue to be in pensionable service when they are transferred, together with the schools in which they are employed, from Local to Municipal service, and vice versa.

the rules in this Chapter

(c) In case (i) any pension granted is charged to the Local Fund Pension Fund and to the General Revenues according to the Rule of Proportions

NOTE.—[Under the rules in force prior to January 1889, an officer paid from a Local Fund was allowed on first appointment with the permission of the Local Government, and upon production of the health certificate prescribed in Article 49 to subscribe for a pension from

803. An officer who is in qualifying service under Government may be transferred by the Local Government to service under a Local Fund under the same limitations and conditions as are applicable to transfers to Foreign Service. If the establishments are fixed and controlled by Government in the same way as Government establishments, the limitations and conditions are those applicable to Foreign Service of the second kind ; otherwise they are those of Foreign Service of the first kind.

804. Teachers and other members of the pensionable establishments of Government Schools, who are transferred with the schools to which they belong to service under Local Boards, continue to render service qualifying for pension from the General Revenues, and are entitled to the concession even though they may be moved from the school with which they are transferred to another school which was formerly under Government management.

Teachers appointed to schools transferred to the management of Local Boards are entitled to pension from the General Revenues if the Local Government makes a part of its contribution to the school in the form of free pensions.

805. If an officer, whose service is reckoned as pensionable under the provisions of Article 802, is transferred to the similarly pensionable establishment of another Local Fund, the transfer will not interrupt the continuity of service for pension. Transfers may also be made between such service under Local Funds and service in Government establishments.

806. Article 755(a) does not apply to an officer transferred to service under a Local Fund under the conditions and limitations of Foreign Service of the second kind otherwise than as a merely temporary arrangement; but it does refer to transfers to service under a Local Fund under the conditions and limitations of Foreign Service of the first kind.

Post Office Annuities.

807. With the permission of the Government, the Trustees, Committee or Managers of any Local Fund may purchase from the Post Office a pension or annuity for any of their servants for whom such pension or annuity is not otherwise admissible: Provided that such pension shall not exceed the amount which the servant might have obtained if his service had been paid from the General Revenues.

NOTE 1.—(When a pension is payable partly by Government and partly by a Local Fund, the Local Fund concerned may pay the capitalised value (calculated according to Table A in Appendix No 10) of its share of the pension into the Government Treasury instead of purchasing an annuity from the Post Office.]

Local Fund Pension Funds.

808. The Government does not guarantee the solvency of Funds formed by the subscriptions of Local Fund officers, and established to provide pensions for the subscribers thereto.

Exceptional Cases.

809. In the following cases, service paid from Local Funds qualifies:—

(a) Service paid from the Cotton Frauds Improvement Fund which qualified for pension payable from that Fund prior to its exhaustion.

(b) Second writers and daroghas on Jail establishments in the Bombay Presidency formerly paid from a Jail Labour Fund.

(c) Muharrs attached to the Court of any Honorary Magistrate in the Central Provinces, and paid from Municipal Funds.

(d) Officers in the United Provinces transferred in connection with the introduction of the Local Self-Government scheme before the 1st April 1885 to service under Local Committees constituted under Acts III and IV of 1878.

(e) Officers in Assam transferred after the 10th May 1882, and before the 12th May 1884, to service under Local or District Committees constituted by the Assam Local Rates Regulation (1879)

(f) Officers in the Punjab transferred before the 1st July 1886 to service under District Boards constituted under Act XX of 1883.

(g) Service paid from the "Quetta Revenue Fund" before the 1st April 1893, from which date the charges previously paid from the Fund became charges on the General Revenues.

SECTION II.—LEAVE, ACTING AND TRAVELLING ALLOWANCE RULES. •

810. Service under the Local Funds which up to 1st April 1908 were treated as Incorporated may qualify for leave under Part III ; but the allowance be disbursed from the Local Funds and the Rule of Proportions : Provided said allowances would be payable from either source, the whole of the allowances shall be charged to the other source.

811. Except in the case of employes of Local Funds which under legal enactment, or under rules framed under such enactment, have special rules regulating all or any of such matters, no leave, or allowances during leave, or acting allowances to an officer paid from a Local Fund, or from any other sources under the control of a Government officer, shall, without the express sanction of the Local Government, exceed what would be admissible under the rules which apply to an officer paid from General Revenues.

NOTE.—[A Local Government may delegate its power under this Article to Heads of Departments]

812. The salary of an officer whose substantive office is paid from a Local Fund appointed to act in an office paid from the General Revenues is calculated as it would be if his substantive office also were paid from the General Revenues.

813. Applications for leave are ordinarily made to the Managers of the Local Fund concerned ; but when the officer contributes for pension and leave, or pension only, Article 780 should be complied with.

814. The travelling allowance rules in Part XI do not apply to officers paid from a Local Fund or from any sources other than General Revenues under the control of any Government officer ; but the travelling allowance paid to such officers shall not, without the express sanction of the Local Government, exceed what would be admissible to similar officers under Part XI.

NOTE.—[A Local Government may delegate its power under this Article to Heads of Departments]

PART VIII.—RECORD OF SERVICE.

—GENERAL ARRANGEMENT.

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PART VIII.—RECORD OF SERVICE.

Chapter XLIII.—Record of Service.

SECTION I.—GAZETTED OFFICERS.

815. (a) A record of the service of gazetted officers and of Myooks and Junior Assistant Registrars in the Co-operative Department in Burma is maintained by the Audit Officer under arrangements which differ in different departments. The general arrangement to be observed is that the Service Registers should be kept by the Audit Officer who audits the salaries, and that, when an officer passes from one audit circle to another, a record of his past service should be passed on from the Audit Officer whose circle he leaves to the Audit Officer to whose circle he is transferred.

(b) In the case of Chaplains, the record is kept by (i) the Accountants General of the Provinces in which the Chaplains serve, and (ii) the Comptroller, India Treasuries, for the Archdeacon of Calcutta and the Presidency Senior Chaplain, Church of Scotland, Bengal.

(c) When a Chaplain of the Church of Scotland is posted to or relieved from the charge of a regiment, the Army Department should inform the Accountant-General concerned.

2. Examiners of Railway Accounts and the Examiner of Accounts, Military Works

SECTION II.—NON-GAZETTED OFFICERS.

816. With the exceptions noted below, every non-gazetted officer holding a substantive appointment on a permanent establishment is required to keep up a Service Book (Form No. 23) in which every step in his official life should be recorded, each entry being contemporaneously attested by the head of his office. If the officer is himself the head of an office (e.g., a Postmaster or a Sub-Inspector of Police), the contemporaneous attestation should be made by his immediate superior. The following are the exceptions referred to:—

Co-operative Department in Burma. (7) Permanent subordinate non-pensionable employés on State Railways for whom a special form of record has been prescribed. (8) Inferior servants of all sorts

817. Service rolls such as those prescribed for the police in Article 823 should be maintained for all officers for whom service books are not kept except runners, boatmen and coolies in the Post Office, and the officers referred to in exceptions (1), (2), (6) and (7) under Article 816. Service rolls should invariably be submitted with the pension papers to the Audit office.

818. A Service Book is supplied at his own cost to every officer on his custody of the head of the office in with him from office to office. It may or is discharged without fault, an entry

819. It is the duty of every officer to see that his Service Book is properly kept up, and that all erasures in it are properly attested. If the book is not carefully kept up, difficulties may arise as to verification of service, when the officer applies for pension.

820. Personal certificates of character should not, unless the Local Government so directs, be entered in column (13), but if an officer is reduced to a lower substantive appointment, the cause of the reduction should always be briefly stated thus—"Reduced for inefficiency," "Reduced owing to revision of establishment," etc.

821. Every period of suspension from employment, and every other interruption in service, should be noted, with full details of its duration, by an entry written across the page, and attested by the head of the office or other attesting officer.

1. The head of the office should take efficient measures to see that these entries are made with regularity. The duty should not be left to the non-gazetted officer concerned.

822. (a) If the officer is transferred to Foreign Service, the head of the office or department should send his Service Book to the Accountant-General, who will return it after noting therein, under his signature, the orders of the effect of the transfer in regard to and any other particulars which be necessary in connection with the transfer. On the officer's re-transfer to the British Service, his Service Book should again be sent to the Accountant-General, who will then note therein, under his signature, all necessary particulars connected with the officer's Foreign Service.

1 No entries made in the Service Book of an officer on Foreign Service of the first kind can be attested by any officer except the Accountant-General

2 Rule 1 does not apply in the case of Public Works and Railway Subordinates (rule 2 under Article 815).

(b) In cases in which the salaries are audited by an Accountant-General, this Article does not apply to Foreign Service of the second kind.

SECTION III.—NON-GAZETTED POLICE SERVICE.

823. In the case of Police officers whose pay does not exceed Rs. 20, there shall be kept up for each district by the District Superintendent of Police a Service Roll in English, in which shall be recorded the date of the enrolment of each man in the Constabulary ; his caste, tribe, village, age, height, and marks of identification when enrolled ; his rank, promotion, reduction or other punishment ; his absences from duty, on leave or without leave ; the interruptions in his service ; and every other incident in his service which may involve forfeiture of portions of his service, or affect the amount of his pension. The roll shall be checked by the Vernacular Roll and Order Book and the Punishment Register, and every entry in it shall be signed by the District Superintendent of Police

824. From this Roll the necessary statement of service of every applicant for pension shall be prepared, additional proofs being collected, as prescribed in Article 908, in respect of any service rendered before enrolment in the Constabulary which the applicant may be entitled to count.

PART IX.—PROCEDURE RELATING TO LEAVE.

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PART IX.—PROCEDURE RELATING TO LEAVE.

Chapter XLIV.—Applications for and Grant of Leave.

SECTION I.—APPLICATIONS.

825. Except as provided in Articles 841 to 845 and 848, an application for leave should be submitted to the Local Government, or other authority whose duty it would be to fill up the appointment of the applicant if it were vacant.

1 When a gazetted officer applies for leave, he should quote the Article or Section of these Regulations under which he considers himself entitled to the leave.

Privilege Leave.

826. An officer applying for Privilege leave must, except when the leave is combined with other leave under Article 233, record a declaration that he has no intention of retiring or of taking long leave of any kind, for three months after his return to duty. Though not absolutely debarred by this declaration from applying for permission to retire or to take long leave within the three months, he should, if he does so, explain his change of mind.

proper in each case.

2. An officer who has been granted Privilege leave in combination with other leave is not permitted to resign the service until a period of at least six months has elapsed from the beginning of his combined leave

827. In applying the preceding Article to officers of the State Railway Revenue Establishments referred to in Article 661 (a), the word "otherwise than as provided by Article 661 (a)" should be added after "kind"

Medical Certificates—General Rules.

827A. Medical Officers are debarred from recommending the grant of sick leave in any case in which there appears to be no reasonable prospect that the officer concerned will ever be fit to return to duty. In such a case, the opinion, that the officer is permanently unfit for service under Government, should be recorded in the Medical certificate.

under civil rules.]

827B. All certificates of medical boards or medical officers granted under the provisions of Article 829 or 831 of the Civil Service Regulations (or under any similar rules applicable to particular classes of officers) should contain a proviso that no recommendation in them shall be evidence of a claim to any leave which may not be admissible to an officer under the terms of his contract or the rules to which he is subject.

Medical Certificates—Gazetted Officers.

828. An application from an officer in India for leave, or extension, or commutation of leave on medical certificate, must be accompanied by a certificate in the following form, or as nearly in this form as the circumstances allow:—

I, A B, Surgeon at (or of) _____, do hereby certify that C D, of the _____

829. With the cognizance of the head of his office, or if he is himself the head of his office, of the head of his department, the applicant must, except in the cases provided for in Article 831, present himself with two copies of the statement of his case at the seat of the Government under which he is serving, or at such other place as may be appointed by that Government, where a Committee of Medical officers can be assembled under the orders of the Administrative Medical Officer of the Province, and when practicable, presided over by him. From this Committee the officer should obtain a certificate as follows:—

We do hereby certify that according to the best of our professional judgment, after careful personal examination of the case, we consider the health of C D to be such as to render leave of absence for a period of (x) months absolutely necessary for his recovery.

830. Before deciding whether to grant or refuse the certificate the Committee may, in a doubtful case, detain the applicant under professional observation during a period not exceeding fourteen days. (See Article 325.)

831. If the state of the applicant's health be certified by a Medical officer, Commissioned or in charge of a Civil Station, to be such as to make it inconvenient for him to repair to the seat of the Government under which he is

serving, or to any other place, the authority by whom the leave is granted may accept either,—

- (1) a certificate signed by any two Medical officers, Commissioned or in charge of a Civil Station, who need not belong to the same province as the applicant; or
- (2) if the authority concerned considers it unnecessary to insist upon the production of two medical opinions, a certificate signed by an officer in medical charge of a Civil Station and countersigned by either the District Officer or the Commissioner of the Division.

832. The certificate obtained should then be submitted to Government for orders. The grant in Article 829 of the option of undergoing medical examination at the seat of the Government under which he is serving, or at any other place, does not confer on the applicant a right to proceed on leave without the sanction of the Government to which he is subordinate.

Medical Certificates—Non-gazetted Officers.

833. Application for leave or extension or commutation of leave on medical certificate must, in the case of an officer in Superior service, be accompanied by a certificate from the applicant's medical attendant. The certificate should distinctly state the nature of the illness, its symptoms, causes and duration, and the period of absence from duty considered to be absolutely necessary for the restoration of the applicant's health. It should be coun-

Page 245. Article 833.

Insert the following Note under this Article :—

NOTE :—[In the case of female educational officers, the local Government may either dispense with counter signature referred to in this Article or authorise such counter-signature by doctors of their own sex.]

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the appli-
his medical
No certificate should be submitted for countersignature without the cognizance of the head of the applicant's office.

835. Cancelled.

Medical Certificates—Gazetted and Non-gazetted Officers.

836. If the officer is going on leave out of India, he should take with him one copy of the medical report upon his case.

837. A duplicate of the medical report of an officer going on furlough on medical certificate or leave on medical certificate to Europe, North Africa, America, or the West Indies should be forwarded without delay direct to the Under Secretary of State for India, by the Local Government under which the officer is employed, for the information of the Medical Board attached to the India Office, so as to arrive as soon as the officer reaches his destination.

838. (a) An applicant for an extension or commutation of leave on medical certificate who is residing in Europe, North Africa, America, or the West Indies, must satisfy the Medical Board at the India Office as to the necessity for the extension or commutation.

Ordinarily he must attend at the India Office for examination at the Board ; but, in special cases, particularly if he be residing at a distance of more than sixty miles from London, a certificate in a form to be obtained from the India Office and signed by two medical practitioners may be accepted. A certificate obtained outside England and signed by foreigners must be attested by consular or other authority as bearing the signature of qualified medical practitioners

(b) An applicant for an extension or commutation of leave on medical certificate who is residing in any place out of India, not mentioned in clause (a) is to be submitted certificates from two

medical practitioners in the following form :—

We hereby certify that we have carefully examined Mr. A. B. of the who is suffering from (the nature of the disease and the present condition of the officer must be fully detailed), and we declare upon our honour that according to the best of our judgment and belief, he is at present unfit for duty in India, and that it is absolutely necessary for the recovery of his health that his present leave which will expire in India on should be extended by months
weeks

Date

Place

The certificate must be attested by the Principal Medical or other authority where the officer resides

SECTION II.—GRANT OF LEAVE.

839. Leave may be granted with retrospective effect from the date on which it is admissible.

840. Unless specially otherwise ordered, leave must begin within thirty-five days of the date on which it is granted.

841. (a) After obtaining a report from the Audit Officer upon the title of an applicant who is a gazetted officer to the leave applied for, the Local Government may grant any leave admissible under the Regulations.

NOTE.—[For the purposes of this rule, Myoobs and Junior Assistant Registrars in the Co-operative Department in Burma are treated as gazetted officers.]

(b) In the case of an officer who is not gazetted, leave may be granted by the authority whose duty it would be to fill up his appointment, if vacant.

The report of an Audit Officer is not required on the title to leave of an applicant who is not a gazetted officer.

(c) The Local Government may, with or without restrictions, delegate the power of granting leave to any officer who, in its opinion, can judge of

the expediency of granting the leave and who can, without reference to higher authority, make the necessary arrangements for carrying on the absentee's duties during the leave. The Local Government may at any time withdraw powers delegated under this clause.

(d) An officer acting under clause (c) must in the case of a gazetted officer, first obtain a report from the Audit Officer that the leave is admissible. If he grants the leave, he must communicate his orders to the Audit Officer by insertion in the Gazette or otherwise. In delegating its powers of granting leave in accordance with clause (c), the Local Government will decide whether, in the case of gazetted officers, either the grant or the refusal of the leave should be reported to it.

842. A Local Government granting leave to a member of the Indian Civil Service on the Bengal, Madras, or Bombay Establishment serving out of his own Presidency, should inform the Government of India, Madras, or Bombay, as the case may be.

843. Leave to an officer appointed by a High Court is granted by the Chief Justice, subject, in the case of gazetted officers, to the report of the Accountant-General that the officer is entitled to the leave.

844. *Cancelled.*

845. *Cancelled.*

SECTION III.—RULES REGARDING CHAPLAINS.

Church of England.

846. Subject to the exigencies of the public service, Local Governments are empowered, with the concurrence of the Bishop of the Diocese, to grant any Furlough or Special leave authorised by these Regulations to Chaplains serving within their respective jurisdictions. Priority of claim is determined in accordance with Article 310.

847. If a Chaplain who is serving on the Local Government Establishment, but is serving on Special leave, the Local Government grants the leave, inform the Chaplain that the leave may be.

848. The Bishop of the Diocese is empowered to grant Privilege leave to Chaplains under Article 592, subject to the public exigencies, of which the Bishop shall be the judge. But the grant, cancelment, or extension of such leave should be reported to the Local Government concerned.

849. All applications for leave should be accompanied by a certificate from the Accountant-General, that the leave asked for is admissible, and should, as a general rule, be forwarded, through the proper channel, to the Bishop of the Diocese, who will transmit applications for Furlough or Special leave, with his remarks to the Local Government concerned, and will himself dispose of applications for Privilege leave. In cases of urgency, leave on medical certificate may be granted by the Local Government in

anticipation of the concurrence of the Bishop, who should, however, be informed without delay.

850. Except under orders of the Secretary of State, the term of Furlough or Special leave cannot be altered without the permission of the Government by which it was granted.

851. Every Chaplain who obtains leave shall supply himself with a last-pay certificate, and with a statement showing the allowances which he is entitled to draw while absent. These documents will be furnished by the Accountant-General (*see Chapter XLVI*), and no leave allowances will be payable without their production.

NOTE.—[If a Chaplain's term of twenty-five years' service expires (*see Article 601*) during his leave, or during the period to which it is stated that it may be extended, the fact should be noted on the last-pay certificate.]

852. A Chaplain shall report his return to duty to the Bishop, and to the Local Government by which his leave or furlough was granted.

853. *Cancelled.*

Church of Scotland.

854. (a) Leave of absence to a Chaplain of the Church of Scotland attached to a regiment, is granted in the same manner as to officers of the Corps with which he is serving, subject to the recommendation of the leave by the Presidency Senior Chaplain of the Church of Scotland.

(b) The leave of such a Chaplain appointed to a station, is granted by the Local Government and notified in the local Gazette.

(c) In the case of the Presidency Senior Chaplain of the Church of Scotland in Bengal, the leave should be granted by the Local Government and by the Government of India concurrently, and be notified in the local Gazette and in the *Gazette of India*.

SECTION IV.—* RULES REGARDING MILITARY OFFICERS.

855 (a) When furlough or leave or an extension of furlough or leave is granted to a Military officer in Civil employ, whether subject to the Civil or the Military Leave Rules, the Civil Audit Officer should intimate to the Account Officer in charge of the officer's record of pension service the date of the beginning and ending of the furlough or leave.

(b) After the furlough or leave has expired in order to return to Europe, the Account Officer in charge of

Secretary of State for India a statement of the officer's service in the prescribed form. The statement is not required in the case of officers proceeding on furlough under the Staff or British Leave Rules.

* Officers in Civil employ who are subject to the Military Leave Rules are eligible for Privilege leave under the rules in Chapter XII of these Regulations.

855A. Applications from Military officers in Civil employ who are subject to Military Leave Rules for privilege leave combined with furlough or

leave, after consultation with the Controller of Military Accounts in charge of the officer's record of pension service.

856 (a) An application for furlough or leave in or out of India under Indian Military furlough or leave rules from an officer in permanent Civil employ or an officer holding an appointment in the Civil Department, the tenure of which is limited, should be submitted through the Account officer* in charge of the officer's record of pension service, who will forward it to the Local Government, stating the furlough or leave regulations to which the officer is subject, and in addition—

- (i) if the applicant is subject to the Military Furlough Regulations of 1868 or 1875—the particular rule or rules of the Regulations under which the furlough is admissible;
- (ii) if the applicant is subject to the Leave Rules for the Indian Army—the year of service for pension he has entered upon, and the date on which that year commenced;
- (iii) if the application is for leave in India—the particular rule of the Regulations under which the leave is admissible.

(b) In the case of officers subject to the leave rules applicable to Regimental officers of the British Army serving in India and holding Civil appointments, applications for leave should be submitted direct to the Local Government. The Controller of Military Accounts will, on application, furnish the Civil auditors concerned with a certificate showing the rate of pay admissible during leave and how the leave may be extended or commuted.

(c) In the case of an officer in Civil employ proceeding on furlough under the Military Furlough Regulations of 1868 or 1875, the Account Officer in charge of the officer's record of pension service will furnish the Civil auditor concerned with the necessary certificate as in Form 1.

857. (a) After the Local Government will, in leave on medical certificate to the Local Government, forward the medical statement of the officer's case to the Under Secretary of State for India.

(b) All reports of officers' arrival from, and departure on, furlough or leave in or out of India with dates of embarkation and debarkation, as well

* The Account Officer is defined in paragraphs 2, 3, 4 and 5 of the General Order in the Military Department No. 134, dated 8th February 1895, as modified by the General Order in that Department, No. 1090 of 1895

as those of being struck off or of resuming duty, should be forwarded to the Account Officer in charge of the officer's record of pension service.

(c) On the return of an officer from furlough or leave, it will be the duty of the Account Officer in charge of his record of pension service to satisfy himself that he has returned within his leave; and, if not, to report the case to the sanctioning authority.

858. When a Military officer subject to the Military Leave Rules applies for leave of absence on medical certificate, or proceeds to a seaport for the purpose of appearing before a Medical Board, he should communicate his intention to his immediate departmental superior when he sends in his application, or before he leaves his station, as the case may be.

859. An application from a Military officer subject to the Military Leave Rules for Special leave under Article 316 should be submitted to the Local Government for sanction with a certificate from the officer in charge of the officer's record of pension service that he is entitled to it.

860. A Military officer subject to the Military Leave Rules proceeding on Furlough or Special leave, cannot obtain a last-pay certificate or a warrant, as the case may be, until he submits to the Audit Officer a certificate in Form 1 by the Account Officer in charge of his record of pension service.

Commissioned Medical Officers.

861. (a) An application for any leave except Privilege leave and leave on medical certificate from a Commissioned Medical officer in permanent or temporary Civil employment, should be submitted by the applicant, together with the Audit Officer's certificate, to the Local Administrative Medical Officer, by whom it will be forwarded to the Director-General, Indian Medical Service.

The Director-General will countersign the application if the state of the public service admits of leave being granted, and forward it to the Local Government. If the state of the public service does not admit of leave being granted, he will abstain from countersigning the application. On the application so countersigned, or from which countersignature has been withheld, the Local Government will be in a position to pass orders. The same procedure will be followed in the case of medical officers applying for extension of furlough on private affairs.

(b) An application for any leave except Privilege leave and leave on medical certificate from a Medical officer appointed by the Government of India should be forwarded, with the Audit Officer's certificate, through the Administrative Medical officer and Local Government, to the Department of the Government of India concerned, who, after consultation with the Director-General, Indian Medical Service, will pass the necessary orders.

NOTE.—[A Local Government granting leave or extension of leave to a Commissioned Medical officer in temporary Civil employ should communicate a copy of the order to the Director of Medical Services in India.]

Chapter XLV.—Payment of Leave Allowances.

862. Leave allowances are payable in India after the end of each calendar month; but an officer on leave out of India may at his option take payment at the Home Treasury from the date of quitting India, or in the case of an officer who has quitted India during the privilege leave portion of combined leave under Article 233, from the date of commencement of such privilege leave; or if he proceeds to a Colony named in Appendix 15, he can take payment in such Colony. Any balance of leave allowances undrawn at the time that an officer returns to duty in India should be drawn there in rupees. In cases, however, where the non-drawal of leave allowances at sterling rates outside India is due to no fault of the officer concerned the Government of India may authorise the undrawn allowances to be paid in India at such sterling rates, converted into rupees at the official rate of exchange.

An officer having selected the country in which he desires to draw his leave allowances is permitted to change only once during any one period of leave.

Payment in India.

863. Except in the Public Works, Railway and Telegraph Departments, a gazetted officer on leave may draw his allowance at any treasury in India.

NOTE.—[For the purposes of this Article, Myooks and Junior Assistant Registrars in the Co-operative Department in Burma are treated as gazetted officers.]

864. If a gazetted officer signs his bill himself, he must either appear in person at the place of payment, or furnish a life certificate signed by a responsible officer of Government, or some other well-known and trustworthy person. If he draws his allowances through an authorised agent, the agent, whether he has or has not a power-of-attorney, must either furnish a life certificate as aforesaid, or execute a bond to refund overpayments. A life certificate may be given periodically, a bond being given to cover intermediate payments not supported by the life certificate.

NOTE.—[The proper stamp-duty upon bonds executed under this Article is that chargeable upon Indemnity Bonds according to the First Schedule of the Indian Stamp Act, II of 1899.]

865. The leave allowances of a non-gazetted officer on leave in India or on leave out of India when he desires to draw his allowances in India can be drawn only at the treasury where his salary is paid, and under the signature of the head of his office, who is responsible for any overcharges: no other security is required.

866. The payment of the leave allowances of officers and subordinates of the Public Works and Railway Departments and of officers of the Telegraph Department during leave in India is regulated by special departmental rules.

Payment out of India.

867. An officer proceeding on leave out of India cannot draw his leave allowance at the Home or any Colonial treasury unless he is provided with a last-pay certificate or warrant in accordance with the rules laid down in Chapter XLVI.

868. When payment is made at the Home treasury or in a colony where the standard of currency is gold, rupees are converted into sterling at the rate of exchange fixed for the time being, for the adjustment of financial transactions between the Imperial and the Indian treasuries, subject to the condition that conversion into sterling shall, for the present, be effected at the minimum rate for 1s. 4d. to the rupee for Privilege Leave, and at 1s. 6d. to the rupee for Leave other than Privilege leave, except when the allowance admissible in respect of such other leave is an officer's last salary, in which case the conversion shall be at the rate of 1s. 4d. to the rupee. Any payments made at a different rate or otherwise erroneously, should be adjusted in subsequent payments.

When the leave allowance is converted into sterling at the rate of 1s. 4d. to the rupee, each fraction of more than

When the leave allowance is converted into sterling at the rate of 1s. 6d. to the rupee, each fraction of more than

869. The leave allowances of all officers are issued at the Home treasury monthly in arrear on the first day of each calendar month.

They are made up to the following quarterly dates, 31st March, 30th June, 30th September and 31st December, and they are paid in monthly instalments, the first two instalments in each quarter being the net amounts accrued, omitting shillings and pence, and the third instalment being the balance due for the quarter.

Payment is made—

- (i) to the officer on his personal application; or
- (ii) to his banker or other agent, duly authorised under power-of-attorney, on production of a life certificate, filled up and executed in the manner directed thereon (except in cases where proof of existence is not required owing to the banker having guaranteed the Secretary of State against loss consequent on his dispensing with the production of such proof); or
- (iii) on presentation of a draft, duly filled up and signed by the officers in a form which, with the requisite form of life certificate attached, may be obtained from the India Office, on the officer's written application.

Certificate of Leave.

870. (a) Privilege leave allowances, when such leave is taken by itself, are not payable out of India; but in case an officer leaving India should

afterwards want to combine his leave with other leave, he should take with him a certificate in Form 9.

(b) This certificate should be furnished to those officers only who may apply for it, and the Audit Officer need make no enquiries as to the place in which an officer intends to spend his Privilege leave. A Military officer subject to the Military Leave Rules must himself obtain the certificate prescribed in Rule 1 of Article 871, and submit it to the Audit Officer with a view to the preparation of his Privilege leave certificate, should he require one.

NOTE.—[Duplicate of a Privilege leave certificate is not forwarded to the India Office.]

871. (a) An officer proceeding on Long Leave to Europe who does not intend to draw allowances from the Home Treasury should take with him a Certificate of Leave in Form 10 from the Audit Officer in whose circle of audit his appointment is held. If he visits England, this certificate is to be presented at the India Office.

1. A Military officer subject to the Military Leave Rules proceeding on Furlough cannot obtain the certificate in this Article until he submits to the Audit Officer a certificate in Form 1 by the Account Officer in charge of his record of pension service.

(b) If the officer afterwards desires to draw his leave allowances at the Home treasury or at some Colonial treasury, he must obtain a last-pay certificate from the Audit Officer in whose circle of audit he was employed when he proceeded on leave.

872. An officer proceeding on Long Leave to North Africa, America, or the West Indies must take with him a certificate in the form prescribed in the preceding Article. If he visits England or has some occasion to apply for an extension of leave, the certificate should be presented at the India Office. If not previously presented, it must be forwarded to the India Office when permission to return to duty is applied for.

873. An officer proceeding on Extraordinary leave without allowances to Europe, North Africa, America, or the West Indies must take with him a certificate of leave in Form 11 from the Audit Officer in whose circle of audit his appointment is held. If the officer visits England, or has occasion to apply for an extension of leave, the certificate should be presented at the India Office. If not previously presented, it must be forwarded to the India Office when permission to return to duty is applied for. The Audit Officer should, when he issues this certificate, send a duplicate to the India Office.

Chapter XLVI.—Last-pay Certificates and Warrants.

SECTION I.—LAST-PAY CERTIFICATES.

874. Except as provided in Article 879, no officer can begin to draw his leave allowances at any treasury in India, or at the Home treasury, without

producing a last-pay certificate from the Accountant-General of the province to which he belongs.

i. No-demand certificates are not required by an officer going on leave.

875. Last-pay certificates (and warrants) cannot be issued to Military officers subject to the Military Leave Rules, until Article 860 has been complied with.

876. Except in respect to Colonial Warrants (Articles 888 to 891), this Section does not apply to Public Works and Railway officers whose last-pay certificates are issued under departmental rules.

Extensions and Commutations.

877. If the leave of an officer, whether in or out of India, is extended or commuted, the Audit Officer within whose jurisdiction the officer is employed must, on receiving advice of such extension or commutation, forthwith communicate it to the Audit Officer within whose jurisdiction his leave allowances are drawn. He should also communicate any other circumstances connected with the leave which may be required to be known to the Audit Officer who passes the officer's leave allowances.

Leave in India.

878. When an officer proceeds on leave from one place to another in India, he should obtain a certificate in Form 16 from the Accountant-General of his Presidency or province. If during leave the officer desires to change the treasury at which he receives payment of his allowances, he must obtain a new last-pay certificate.

879. An officer on leave, who does not leave his district does not require a last-pay certificate; nor does an officer who leaves his district on leave in India without allowances.

Leave out of India.

880. When an officer proceeds out of India on leave with allowances, other than Privilege leave taken by itself, the Accountant-General who audits his pay will, as soon as the leave is gazetted or otherwise notified, send him a letter in Form 12 or 13 with enclosure in Form 14 or 15 as the case may be, requiring him to call at his office or give the necessary information.

881. If the officer calls at the Accountant-General's office, he will be paid up to the day before he leaves India, and will be given a last-pay certificate in Form 16 if he intends to draw his leave allowances at the Home treasury, and in Form 17 if he is proceeding to a Colony and intends to draw his leave allowances there.

NOTE—[An officer on combined leave under Article 233 who proceeds out of India during the Privilege leave portion of such leave, may be granted a last-pay-certificate in view to the payment of his allowances at the Home Treasury or in a Colony from the commencement of his Privilege leave. In that event, he must draw in India allowances due up to the date of giving up charge of his office.]

882. If the officer is unable to call at the Accountant-General's office, the Accountant-General will prepare a bill for his allowances from the end of the month preceding that of his making over charge, to the day before he sails, and will (if the officer intends to draw leave allowances at the Home treasury or in a Colony) forward it with the certificate in Form 16 or 17 as the case may be, to the Treasury Officer, for delivery to the officer according to the instructions in Form 18.

NOTE.—[See Note under Article 881.]

883. With every such last-pay certificate a blank Form 19 will be given, on which the officer will report to the Accountant-General, from the first port at which the vessel touches, the day of his departure from India.

884. When the Audit Officer delivers, or receives from the Treasury Officer, a report in Form 20 that he has delivered a last-pay certificate to the officer concerned, he will, if the certificate is in Form 16, forward a duplicate of the certificate to the India Office.

885. When the officer proceeding to England is compelled to leave without a last-pay certificate, the necessary document should be forwarded to him, and a duplicate to the India Office, at the earliest possible date.

886. An officer proceeding to Europe should present his last-pay certificate at the India Office. When he returns to India, he should obtain a last-pay certificate from the India Office.

887. A last-pay certificate in Form 16—the 11th and 13th columns and the notes below it being omitted—is required in the case of an officer proceeding on leave out of India whose leave allowances, payable in India, are required to be paid in a circle of audit other than that under which the officer's appointment is held. If change of treasury is at any subsequent time desired, a new last-pay certificate in the same form must be issued by the Accountant-General who last paid the allowances.

Colonial Warrants.

888. (a) An officer, including an officer of the Public Works or Railway Department (*see Article 876*), proceeding to a Colony should submit his last-pay certificate to the Comptroller, India Treasuries, at Calcutta, or if he embarks at any port in the Provinces of Madras, Bombay, or Burma, to the Accountant-General, Madras, Bombay, or Burma, as the case may be.

(b) The Comptroller, or the Accountant-General, as the case may be, will retain the last-pay certificate, and, in lieu thereof, issue a Warrant in Form 21 upon the Colonial authority concerned.

889. Every Warrant shall be issued in triplicate. The original, bearing the payee's signature, should be forwarded to the Colonial authority concerned, the duplicate to the Secretary of State, and the triplicate should be made over to the payee. Each payment should be endorsed on the back of both the original and the triplicate Warrant, an acknowledgment of receipt of money being rendered by the payee. When no space for such entries remains, or when a Warrant is lost or destroyed, a fresh Warrant shall be issued by the

officer who issued the original Warrant, on application being made through the Colonial disbursing officer.

890. Upon his return to India, an officer should deliver up his copy of the Warrant which will serve the purpose of a last-pay certificate.

891. The Government of India recognise the proceedings of the Colonial authorities sanctioning the transfer of The payment of leave allowances from one Colony to another, but such transfer should be reported separately by the absentee to the Government of India and to the Under-Secretary of State for India.

NOTE.—[Articles 890 to 891 apply to Military officers subject to the Military Leave Rules.]

Copy of Rules to be furnished.

892. Every officer going on leave out of India should procure from the Account Office and take with him a copy of the "Memorandum of information issued for the guidance of officers proceeding on leave (other than Privilege leave taken by itself) out of India."

SECTION II.—RULES FOR PREPARING LAST-PAY CERTIFICATES.

893. In Forms 16 and 17 it should be stated to which Presidency an officer belongs, in which Presidency or province he is employed, and whether the absentee allowance is chargeable to the Civil, the Military, or the Public Works Department.

894. To enable the Home authorities to ascertain at once the Department to which the absentee allowance is to be charged, the certificates of officers proceeding on leave to Europe shall be prepared—

- (i) in Black ink for officers in the employ of the Military Department.
- (ii) in Blue ink for officers in the employ of the Public Works or Railway Department.
- (iii) in Red ink for officers in the employ of the Civil Department.

895. Except in the case of Chaplains, allowances should be stated in rupees a month, and not in pounds a year; and in entering "the rate of absentee allowances," it should be stated, in the first place, without reference to the maximum or minimum applicable, and then, if a maximum or minimum applies or if the allowance is such that a future change in the official rate of exchange may render a maximum or minimum applicable, the words should be added, "subject to a maximum (or minimum) of," etc.

896. In Form 16 it must be shown whether an officer is entitled to the full amount of Furlough permitted by the rules.

NOTE.—[See Note under Article 831.]

897. In column 11 in Forms 16 and 17, the Articles of these Regulations or of the Military Furlough Regulations under which the advance is made should be mentioned.

Amended Certificates.

898. (a) Every corrected last-pay certificate whether original or duplicate should be marked "Amended Certificate." If it becomes necessary to amend a last-pay certificate in Form 16, it should be done by the use of a short corrigendum worded so as to show only the particular item or items in which alterations have been made; this corrigendum should be forwarded by the Accounts Officer at the earliest possible date direct to the India Office.

(b) The last-pay certificate is issued on the assumption of the correctness of the intended dates of making over charge and of leaving India. If these dates are changed, the required adjustment of allowances will be made when the officer returns to India, or, if necessary, sooner. No alteration may be made in the certificate as issued by the Accountant-General unless there is time to send it to him for alteration.

(c) In all cases of combined leave in which an officer elects to draw his Privilege leave allowances at the Home Treasury, an amended last-pay certificate should be sent to the India Office whenever the amount of Privilege leave allowances entered in the original last-pay certificate requires correction, unless the officer is known to have started on his return to India. If the amended last-pay certificate arrives too late at the India Office, it will be returned to the issuing officer in India.

Source from which Absentee Allowance is payable.

899. In making entries against the heading "Source from which," etc., the term "Indian Revenues" should be used in all certificates intended to be sent to England, as the term "Imperial Revenues" has there a different signification. If the allowance is not chargeable finally to the Government of India, the Local Administration or Fund from which it is recoverable must be expressly stated.

900. When leave allowances are chargeable according to the Rule of Proportions, the following is the service to be thus taken into account :—

(a) *Privilege Leave, under Articles 246 to 278 .—*

Privilege leave; duty without interruption for a period eleven times as long as the Privilege leave.

(b) *Long Leave, European Services, under Chapter XIII .—*

Furlough on Medical certificate (Articles 303 to 311); the whole continuous service.

Furlough without medical certificate, including extensions (Articles 303 and 309); the whole continuous active service.

Special leave; active service for six years.

Subsidiary leave; as for the leave to which it is subsidiary.

(c) *Military Furlough Regulations of 1863 :—*

Furlough without medical certificate—

First two years (Rule IX); actual service in India for eight years.

The rest; actual service in India for six years.

(d) *Military Furlough Regulations of 1875 :—*

Furlough without medical certificate (Rule 1); proportion of service in India or under the Government of India taken into calculation in the grant of furlough.

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(e) *Leave Rules for the Indian Army :—*

All leave; the whole pensionable service, but in this case, in calculating the charge to be borne by a Foreign and the British Government, the period of service, and not the aggregate salary drawn is taken into account.

(f) *Long leave, Indian Services, under Chapter XIV, and Statutory Civil Servants, under Chapter XVI :—*

Leave on private affairs [Article 337 or 566 (Leave Regulations), Section 4 (b)]; service for six years.

Furlough [Article 338 or 566 (Leave Regulations), Section 4 (c)]—

First year, service for ten years

Second year, service for eight years

More than one year, service for eighteen years

(g) *Other cases —*

In unenumerated cases the whole service in India is counted

Arrears of Indian Pay and Allowances.

901. No entries in regard to arrears of Indian pay and allowances due to an officer proceeding on leave or on retirement to Europe should be made in his last-pay certificate. Such allowances are not paid at the Home treasury.

Completion of Service.

902. The date on which any officer will, during the currency of leave, complete the term of service, or attain the age after which by any rule he is required to retire from the service, should be shown.

Civil Fund Deductions.

903. (a) The Secretary of State recovers subscriptions on account of the different Civil Funds from subscribers absent from India on leave who draw their leave allowances in England, who either are required by the rules of their Fund to pay their subscriptions in that country during leave, or elect to do so. Particulars of the Fund deductions to be made from the absentee allowances of officers on leave drawing their leave allowances in England should be noted on the last-pay certificates; and where a subscriber elects to make payments of his subscriptions in India while on leave, or to postpone such payments until his return to India, the fact should also be noted on the last-pay certificate. *The rules under which the deductions are made, and the method by which they are calculated in the cases of the different Funds will be found in Articles 557 to 560.*

(b) The deductions to which the allowances of a member of the Indian Civil Service are subject while he is on leave on account of his annuity should invariably be stated in his last-pay certificate. (*See Article 556.*)

Chaplains.

904. A certificate in Form 30 should be attached to the last-pay certificate of a Chaplain proceeding on leave to Europe.

PART X.—PROCEDURE RELATING TO PENSIONS.

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(c) If there be any discrepancy, the Audit Officer will detail the nature of such discrepancy; for instance, that the post which the applicant states that he filled during a certain period is shown by the Audit Office registers to have been filled by another man.

(d) If the service claimed cannot be wholly verified from the records of the Audit Offices, reference must be made to the head of the office in which the applicant states that he served during the period in doubt.

(e) If it be found impossible to verify the service otherwise, the officer receiving the application should take the statement in writing of the applicant on plain paper [see *Indian Stamp Act, II of 1899, Schedule I, No. 4 (c)*], and should also collect such collateral evidence as may be procurable; for instance, certificates, such as those given by an officer to a subordinate on his leaving an office, and the testimony of contemporary servants.

NOTE 1.—[The power to admit service verified under this clause may be exercised by all subordinate authorities who are empowered to sanction pensions under the rules.]

NOTE 2.—[The Government General Council has recently had under consideration a case in which an officer had been appointed to a post in the Indian Civil Service. I am therefore directed to draw attention to the subject, and to request the issue of orders to all public officers, warning them to be careful, in giving certificates to their subordinates, to state the whole truth in respect of character and cause of dismissal or resignation of appointment.—(Circular, Home Department, dated 13th June 1899)]

909. In the case of a gazetted officer, part of whose service has been rendered in non-gazetted appointments, the ungazetted portion of his service should be similarly verified. The statement mentioned in Article 907 (a) may, however, be sent to the Audit Officer direct or through the head of the department.

Formal Application.

910. After completing the verification in the manner prescribed in the preceding Article, the authority receiving the statement of services of a non-gazetted officer should draw up the application in Form 25, and arrange with it all the documents relied upon for verification of the service claimed, in such manner that they can be conveniently consulted, and then forward it, together with the officer's Service Book, with the statement in Form 24 duly completed up to date, through his official superiors to the Audit Officer. If an applicant for pension (not gratuity) is no longer in active service, a last-pay certificate should be attached to the application, except when he retires from the service while on leave in England and desires to draw his pension in England.

911. (a) The officer who submits the application should certify on the application whether the character, conduct, and past services of the applicant are such as to entitle him to the favourable consideration of the Government. If the application is for pension on the Superior scale, he must be careful to enter all period of leave, suspension, etc., which are not reckoned as service.

(b) He must also invariably record his own opinion whether the service claimed has been established, and should be admitted or not; more

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especially in those cases in which it becomes necessary to resort to the procedure prescribed by clause (c) of Article 908, when the exact nature of the investigation made, and the conclusion at which the authority has arrived, must be especially reported.

(c) If the application is for an Invalid pension, and the applicant is less than sixty years old, the requisite medical certificate should be attached to the application. But if omission has been made in this respect, the authority having the power to sanction the pension may accept a certificate bearing a later date.

912. In the case of an officer in superior service, who retires before he is 60 years of age, it should be stated in the column for "any other remarks" on the third page of the application for pension whether retirement is compulsory or optional and, when compulsory, the order sanctioning retirement should be quoted and cause of inefficiency specified.

913. (a) A gazetted officer should submit his application through his official superiors and the Audit Officer to the Local Government or other authority empowered to sanction the pension.

NOTE.—[For the purposes of this Article, Myooks and Junior Assistant Registrars in the Co-operative Department in Burma are treated as gazetted officers.]

(b) The application of a gazetted officer of the classes mentioned in Articles 297 (c), (d), and (e) 654 and 678, whether appointed by the Secretary of State or not, should be prepared in Form 26. In the case of other gazetted officers the application should be prepared in Form 25 either by the officer himself or by the head of his department; and the rules in Article 910 apply, save that it is not necessary, if all the service has been gazetted to have the service formally verified before forwarding the application.

Submission to Government.

914. (a) The last officer through whom the application passes should send it to the Audit Officer, who will (after verifying the service in the manner prescribed in Article 908 or satisfying himself that it has already been so verified) submit the application to the Local Government or other authority empowered to sanction the pension with a report upon the claim for pension and the rules applicable to the case.

In the case of officers whose service has been partly gazetted and partly non-gazetted, the verification statement prepared in the Audit office should be attached to the application on its submission to the sanctioning authority.

(b) The Audit Officer will also certify the correctness of the calculations of service and of pension, and retain the last-pay certificate (Article 910) unless the pension is to be paid in another circle of audit, in which case he will forward the certificate to the Audit Officer of that circle, along with a copy of the order sanctioning the pension.

1. If the case is plainly incorrect or incomplete, the Audit Officer should return it for correction or explanation.

2. In the column of Form 24 reserved for the remarks of the Audit Officer, or in his certificate and report on the third page of Form 26, he should note briefly his reasons for

3. The Audit Officer should always call special attention to Article 470 in his report of the amount of pension admissible.

(b) The Audit officer will, on receipt of the pension papers, exercise the necessary check on the basis of the facts entered therein and also with reference to the relevant rules. If the claim is in order and has already been sanctioned by competent authority, he will arrange for its payment forthwith. In other cases, he will follow generally the procedure laid down in Article 914(b).

NOTE 2—[In the case of the Police Officers on pay not exceeding Rs 20 a month the procedure laid down in entry No. 40 in Part III of Appendix I will be followed.]

Premature Applications.

(b) Accordingly no question about the pension of an officer who has not retired from the public service should be submitted either to the Local Government, or by the Local Government to the Government of India unless there are special reasons (which should always be set forth) for a departure from the general rule. The mere desire of an officer for a decision upon some doubtful abstract questions affecting his prospects does not justify public correspondence on his behalf. But this rule should not be read as prohibiting the consideration until an officer retires or is about to retire, of a proposal to condone a break in his service.

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916. Except under orders from the Government of India or the Local Government, an Audit Officer should, as a rule, decline to advise upon any questions connected with the claim of an officer to pension until he retires or is about to retire. Memorials which relate to such questions addressed prematurely to the Secretary of State are uniformly returned.

917. Articles 915 and 916 do not prohibit the submission of a preliminary application for pension [see Article 907 (b)] on behalf of an officer intending to retire immediately, while he is still in employ.

SECTION II.—POWERS OF SANCTION.

918. A pension which is certified by the responsible Audit Officer to be clearly and strictly admissible under rule may be sanctioned—

- (a) in any case, by the Local Government,
- (b) in the case of non-gazetted officers, by the officer who has the authority to fill the appointment vacated by the retiring officer.

NOTE 1.—[A Local Government may delegate its powers under this Article to Heads of Departments and other subordinate officers who are authorised to fill the appointment vacated by the retiring officer.]

NOTE 2.—[In cases in which an officer who has the power under clause (b) of this Article is concerned, the Local Government should be consulted.]

919 to 920.—*Cancelled.*

921.—(See Appendix I, Part II, Entry 40.)

922. Should the amount granted to an officer be afterwards found to be in excess of that to which he is entitled under the Regulations, he will be called upon to refund such excess.

923. (a) If any interpretation of the rules is involved, or if any indulgence not provided for by the rules is proposed, the Local Government should submit the case, with its opinion and recommendation, to the Government of India in the Administrative Department concerned.

NOTE.—[In respect to such recommendations, see orders printed as Appendix 9.]

(b) Until the orders of the Government of India are received, a recommendation for any special indulgence should never be communicated, directly or indirectly, to the officer concerned.

(c) The Governments of Madras and Bombay should, upon questions of pension, communicate with the Secretary of State, through the Government of India.

(d) An application in Form 25 (together with the statement in Form 24) or 22, as the case may be, should accompany every special recommendation made under this Article.

924. (a) Pensions in excess of the amounts admissible under these Regulations, or involving any relaxation of rule, require the sanction of the Secretary of State.

NOTE.—[See Note under clause (a) of the preceding Article.]

(b) The Government of India have, however, been authorised to grant pensions up to a limit of Rs. 25 a month, or gratuities not exceeding the equivalent value of that amount, without reference to the Secretary of State, in any case, even where no pension or gratuity is admissible under rule, provided that the general spirit of the Regulations is observed. Provincial Governments exercise similar powers in respect of officers serving under them.

(c) When special circumstances appear to justify a departure from the rules laid down regarding "ordinary pensions" to Civil officers, it is generally desirable that the allowance granted should be an arbitrarily fixed sum, rather than any exact proportion of the amount to which it might be supposed that the rules afford a claim.

SECTION III.—ANTICIPATORY PENSIONS.

925. (a) When an officer whose pension is payable in India retires before the necessary enquiries preliminary to the settlement of the amount of his pension can be completed, the Audit Officer may, upon a declaration, as follows, by the officer, sanction the immediate disbursement of the pension to which, after the most careful summary investigation that he can make without delay, he believes the officer likely to be entitled :—

Declaration—Whereas the above state the declaration of the officer as follows:

1.
2.
3.
4.

further promise to repay any amount advanced to me in excess of the pension to which I may be eventually found entitled.

(b) If the Audit Officer thinks it likely that the officer would be found entitled to a gratuity only, one-sixth of the amount of such probable gratuity may, upon a similar declaration, be disbursed to him monthly until the amount is finally settled.

(c) The settlement of such provisional payments should be made so as to admit of their disbursement not later than one month after the officer has ceased to hold his post.

(d) When the sanction under this Article is given by an Audit Officer other than the Accountant-General, he shall send a copy of his order to the Accountant-General, for the issue of the requisite orders for disbursements from the treasury concerned.

926. When an officer whose pension is payable in England retires before the necessary enquiries preliminary to the settlement of the amount of his pension can be completed, the Audit Officer, if he sees reason to believe

that there will be delay before the pension can be finally sanctioned, should, after the most careful summary investigation that he can make without delay, report to the authority who will sanction the pension, the minimum amount to which he believes the officer to be entitled. This report should be forwarded at once to the India Office by the Local Government by which the pension will in due course be sanctioned. The India Office will then, on receiving from the officer a declaration similar to that in Article 925, at discretion, sanction the immediate disbursement of the amount of pension reported to be the minimum likely to be admissible, or such smaller amount as may be deemed proper. The final pension certificate in due form should follow the provisional certificate with the least possible delay.

927. (a) If, upon the completion of the regular investigation, it be found that the pension thus summarily assigned differs from the pension finally settled, the difference must be adjusted in the first subsequent payments

(b) Provided that, if a gratuity summarily assigned under Article 925 proves to be larger than the amount found actually due upon completion of the enquiries, the officer shall not be required to refund any excess actually paid to him, except as provided in Chapter XXI.

928. (a) To enable the Audit Officer to exercise the jurisdiction thus entrusted to him, the head of the office or department from which the officer is removed should furnish to the Audit Officer, as soon as possible, after it becomes known to him that the officer must retire, and without waiting for his actual retirement, the fullest information that can be obtained regarding the officer's service, without correspondence which must cause delay.

(b) This information is to be furnished in anticipation of the regular investigation required by Article 908 or 909, which also should on no account be delayed until the officer has actually retired

929. All officers should bear in mind that delay in the payment of pensions may involve peculiar hardship, and everything should be done to prevent, or shorten to the utmost, such delays.

Chapter XLVIII.—Payment of Pensions.

SECTION I.—GENERAL RULES.

930. Apart from special orders, a pension, other than a Wound or Extraordinary pension under Part VI, is payable from the date on which the pensioner ceased to be borne on the establishment, or from the date of his application, whichever is later. The object of this latter alternative is to prevent unnecessary delay in the submission of applications. The rule may be relaxed, in this particular, by the authority sanctioning the pension when the delay is sufficiently explained.

1. The pension of an officer who, under Article 436, has received a gratuity in lieu of notice is not payable for the period in respect of which the gratuity is paid.

931. The preceding Article applies to ordinary, not to special, cases. If, under special circumstances, a pension is granted long after an officer has retired, retrospective effect should not be given to it without the special orders of the Government which granted it; in the absence of special orders such pension takes effect only from the date of sanction.

932. In cases where considerable delay has occurred in making application for a Wound or Injury pension, it will be granted only from the date of the report by the Medical Board, and no application for a gratuity or pension will be entertained unless submitted within five years of the date of the wound or injury.

933. When a pension is stated in Rupees, it is payable at any treasury in India; or, at the pensioner's option, at the Home treasury.

Governments subject to the condition that in the case of persons resident in any country in which the Indian Government rupee is not legal tender, 1s. 9d. the rupee is fixed as the minimum rate at which the conversion into sterling shall be effected. The same rate of exchange applies to the issue of gratuities to persons residing in any country in which the rupee is not legal tender; but when the service of an officer to whom a gratuity is granted terminates in India, the gratuity should be paid in India.

NOTE 1.—(Ordinarily, a pensioner who has been residing in India or other country in which

NOTE 3.—[In the event of a case arising which appears not to be covered by the foregoing rules, reference must be made to the Secretary of State.]

935. The rule in Article 934 applies to an officer under covenant who is entitled by his covenant to pension; the covenanted rate of exchange for his pay and allowances does not, unless it is expressly so stated, apply to his pension.

Transfers between England and India.

936. Transfer of a pension from an Indian treasury to the Home treasury and vice versa is permitted within reasonable limits whenever desired.

NOTE.—[Frequent transfers of a pension to and from are not permissible, and the Accountant-General concerned should report to the Government of India, for special orders any case in which it appears to him that undue advantage is being taken of the rule.]

941. (a) A gratuity may, at the discretion of the Government of India, or with the sanction of the Government of India, on the application of the recipient, be converted either into a life annuity, or into a temporary life annuity, or into an annuity payable for a fixed number of years with remainder to the annuitant's heirs in case of his death. The amount of the life annuity or temporary life annuity will be determined by Table A printed in Appendix 10.

(b) A Local Government may exercise the power of the Government of India under clause (a) of this article in respect of gratuities sanctioned by it or by an authority subordinate to it

942. The Government of India or a Local Government will never insist on the conversion of a gratuity into an annuity, unless the expectation of life of the officer be reported by competent medical authority to be equal to the average.

943. A pension is payable in India monthly on and after the first day of the following month under the following rules :—

1. On receipt of the Pension Payment Order, the disbursing officer will deliver one half to the pensioner, and keep the other half carefully, in such manner that the pensioner shall not have access thereto

2. Each payment made is to be entered on the reverse both of the pensioner's half and of the disbursing officer's half of the Pension Payment Order, both entries being attested at the time of payment by the signature of the disbursing officer.

3. With reference to Articles 956 and 957, a pension should, under no circumstances, be paid for the first time in arrears for more than one year without special orders of the Local Government.

NOTE.—[The Local Government may delegate its powers under this rule to Commissioners of Divisions and to such other officers as it may desire.]

4. A pension is payable for the day on which the pensioner dies

5. In regard to the liability of pensions to attachment by a Civil Court, see section 11 of Act XXIII of 1871, which runs as follows :—

Section 11.—“ No pension granted or continued by Government on political considerations,

any such court

Identification of Pensioner.

944. As a rule a pensioner must take payment in person after identification by comparison with the Pension Payment Order.

NOTE.—[Officers of the classes mentioned in Articles 297 (c), (d) and (e), 634 and 675,

945. A pensioner specially exempted by the Local Government from personal appearance, a female pensioner not accustomed to appear in public, or a male pensioner who is unable to appear in consequence of bodily illness or infirmity, may receive his or her pension upon the production of a life certificate signed by a responsible officer of Government or by some other well-known and trustworthy person.

NOTE.—[The power to grant exemption under this Article from personal appearance to draw pension may be delegated by a Local Government to any officer of not lower rank than Collector of a District.]

946. A pensioner of any description who produces a life certificate signed by some person exercising the powers of a Magistrate under the Criminal Procedure Code, or by any Registrar or Sub-Registrar under the Registration Act, or by any pensioned officer who, before retirement exercised the powers of a Magistrate, or by a Chaplain, or any gazetted officer of Government or by a Munsifi or a Judicial Myook in Burma, or by any person holding a Government title, is also exempted from personal appearance.

947. (a) In all cases referred to in Articles 945 and 946, the disbursing officer must take precautions to prevent impositions, and must, at least once a year, require proof independent of that furnished by the life certificate of the continued existence of the pensioner.

(b) For this purpose he should (save in cases of exemption from personal appearance granted by the Local Government) require the personal attendance and due identification of all male pensioners who are not incapacitated by bodily illness or infirmity from so attending, and in all cases where such inability may be alleged, he should require proof thereof in addition to the proof submitted of the pensioner's existence.

1. The disbursing officer is personally responsible for any payment wrongly made. In case of doubt, he should consult the Accountant-General.

2. A pensioner of rank may be privately identified by the disbursing officer and need not be required to appear at a public office.

948. Payment of pensions to Police pensioners are made in accordance with the rules in this Section, but if the disbursing officer entertains any doubt as to the identity of such a pensioner, he may require the local Inspector of Police to identify him. The Inspector would then be responsible for the correct identification of the pensioner.

Payment to Agents.

949. (a) A pensioner not resident in India may draw his pension at any treasury in India through a duly authorised agent, who must either produce a certificate by a Magistrate, a Notary, a Banker, or a Minister of religion, on each occasion, that the pensioner was alive on the date to which his pension is claimed, or execute a bond to refund over-payments, and produce such a certificate as aforesaid at least once a year.

(b) A pensioner of any description resident in India is exempted from personal appearance if he draws his pension through a duly authorised agent approved by the Local Government, who must execute a bond to refund over-payments and produce at least once a year a life certificate signed by any of the persons authorised by Article 946 to sign such certificates.

(c) The pension of an officer drawing his pension through an agent who has executed a bond to refund overpayments should not be paid on account of a period of more than a year after the date of the life certificate last received,

and the Accountant General and the disbursing officer should be on the watch for authentic information of the decease of any such pensioner, and on receipt thereof, should promptly stop further payments.

Transfers in India.

950. A Local Government or an Accountant-General may, on application and on sufficient cause being shown, permit transfer of payment from one treasury in India to another. This jurisdiction may be delegated by the Local Government to any Executive authority not lower than that of the Collector or other District officer.

951. (a) A copy of any order issued by a Local Government or other executive authority under the preceding Article, should be forwarded to the Accountant-General, and the Collector of the district from which the payment is to be transferred should be instructed to return his half of the Pension Payment Order.

(b) The Accountant-General will then either issue a new payment order, or efface the payment order for payment at the new treasury, and forward it to the Treasury Officer, who will, in future, pay the pension, or, if the treasury is in another province, will move the Accountant-General of that province to do so.

952. A Treasury Officer may authorise payment in any of the outlying treasuries subordinate to his district treasury of a pension payable under proper authority, at his head-quarters, and may transfer the payment of a pension from such subordinate treasury to the district treasury, or from one subordinate treasury to another in the same district.

Certificate of Non-Employment.

953. (a) A pensioner drawing pension in India is required to append to his bill a certificate as follows :—

“ I declare that I have not received any remuneration for serving in any capacity, either under Government or under a Local Fund, during the period for which the amount of pension claimed in this bill is due.”

(b) In the case of a pensioner permitted under Chapter XXI to draw pension after re-employment, this certificate should be modified according to the facts.

Renewal of Pension Payment Order.

954. When the reverse of a Pension Payment Order is filled up, or when the pensioner's half is found to be worn or torn, both halves may be renewed by the Treasury Officer.

955. If a pensioner loses his half of the Pension Payment Order, a new order may be issued by the Treasury Officer, who should see that no payment is made on the half alleged to be lost by a strict observance of Rule 3 under Article 913. The necessary note should be made in the remarks column of the register in Form 39, Civil Account Code.

Lapses and forfeiture.

956. If a pension payable in India remains undrawn for more than one year, the Pension Payment Order must be returned to the Accountant-General, and the pension ceases to be payable.

957. If the pensioner afterwards appears, the disbursing officer may reclaim the Pension Payment order and renew his payments. But the arrears cannot be paid (a) without the orders of the Accountant General, and (b) if the pension in arrears is to be paid for the first time or if the amount of arrears exceeds Rs. 1,000 without the previous sanction of the authority by whom the pension was sanctioned to be obtained through the Accountant General.

NOTE.—[In cases where the pension is sanctioned by the Local Government, it may delegate its powers under this Article to Heads of Departments or other subordinate authorities.]

958. If the suspension of payment is attributable to error or neglect by any public officer, the Accountant-General may direct payment of the arrears without taking the orders of the Government.

Deceased Pensioners.

959. (a). On the death of a pensioner, payment of any arrears actually due may be made to his heirs, provided that they apply within one year of his death. It cannot be paid thereafter without the sanction of the authority by whom the pension was sanctioned to be obtained through the Accountant General.

NOTE.—[In cases where the pension is sanctioned by the Local Government it may delegate its powers under this Article to Heads of Departments or other subordinate authorities.]

(b) But if the arrears do not exceed Rs. 100, and the case presents no peculiar features, the Accountant-General is empowered to pass the arrears on his own authority.

(c) After payment of the arrears of pension, the Pension Payment Order² should be returned to the Accountant-General with a report of the date of the death of the pensioner

960. Subject to the provisions of the preceding Article, the arrears of pension of a deceased pensioner may be paid to the heirs of the deceased without the production of the usual legal authority, to the extent of Rs. 500 under the orders of the Local Government, after such enquiry in the matter as may be deemed sufficient. Any sum so paid under the orders of the Local Government on execution of an indemnity bond, with such sureties as it may require, if it is satisfied of the right and title of the claimant and considers that undue delay and hardship would be caused by insisting on the production of letters of administration.

In any case of doubt, payment should be made only to the person producing legal authority.

961. If an officer dies before actually retiring or being discharged, his heirs have no claim to anything in respect to his pension.

SECTION III.—PAYMENT IN ENGLAND.

962. When a pension is granted to an officer who desires that payment thereof from the date of its commencement should be made at the Home treasury, the Audit Officer, who audits the pay of the officer, should, on receipt of sanction to the grant of pension, issue a last-pay certificate, and forward to the India Office a duplicate thereof, together with copy of the first page of application for pension and the order of the Local Government or other authority granting the pension. The forwarding letter should always request that payment be made from some specific date, the date being ascertained from the last-pay certificate.

963. If the pension is not wholly chargeable against the General Revenues, care must be taken to state in the certificate how it is to be charged.

964. The annuities and pensions of all officers are issued at the Home treasury monthly in arrear on the 16th day of each calendar month.

They are made up to the following quarterly dates, viz., to the 15th March, 15th June, 15th September and 15th December; and they are paid in monthly instalments, the first two instalments in each quarter being the net amount accrued, omitting shillings and pence, and the third instalment being the balance due for the quarter.

965. Intimation of any revision of a pension paid at the Home treasury should be made to the Secretary of State, so as to reach him before the pensioner is informed.

SECTION IV.—PAYMENT IN A COLONY.

966. The rules in this Section apply to pensions granted under the rules in any Chapter of these Regulations. The pension of a pensioner residing in any Colony named in Appendix 15 may be paid there.

Issue of Warrant.

967. The authority for payment for a pension in a Colony shall be a Warrant in Form 29 to be issued—

- (i) in the case of a pension granted to an officer serving elsewhere than under the Government of Madras or Bombay, or paid from an Indian treasury not in account with the Accountant-General, Madras or Bombay;—by the Comptroller, India Treasuries.

- (ii) in the case of a pension granted to an officer serving under the Government of Madras or Bombay or paid at any treasury in account with the Accountant-General, Madras or Bombay ; —by the Accountant-General, Madras or Bombay, as the case may be.

968. When a pension is first granted to an officer serving otherwise than under the Government of Madras or Bombay, and the pensioner desires that it shall be paid in a Colony, or when transfer of payment of a pension heretofore paid at some Indian treasury not in account with the Accountant-General, Madras or Bombay, from India to a Colony is desired, the Accountant-General shall furnish all particulars to the Comptroller, India Treasuries, who will issue the necessary warrant.

969. When a pension is first granted to an officer serving under the Government of Madras or Bombay, and the officer desires that it shall be paid in a Colony, or, if transfer of payment of a pension hitherto paid at some treasury in account with the Accountant-General, Madras or Bombay, from India to a Colony is desired, the Accountant-General, Madras or Bombay, as the case may be, will issue the necessary warrant.

970. Every warrant shall be issued in triplicate. The original, bearing the payee's signature, should be forwarded to the Colonial authority concerned, the duplicate to the Secretary of State, and the triplicate should be made over to the payee. Each payment should be endorsed on the back of both the original and the triplicate warrant, an acknowledgment of receipt of money being rendered by the payee. When no space for such entries remains, or when a warrant is lost or destroyed, a fresh warrant shall be issued by the officer who issued the original warrant on application being made through the Colonial Disbursing Officer. The letter forwarding the duplicate Warrant to the Secretary of State should invariably furnish the following information, viz. :—

- (1) Whether the pensioner is already on leave in the Colony.
- (2) Date of his retirement.
- (3) Date of leaving India.
- (4) Date of birth.

Rate of Exchange.

971. Pensions stated in Indian money shall, in a Colony in which the Indian Government rupee is not legal tender, be paid in sterling money at the rate of exchange annually fixed for the adjustment of transactions between the British and Indian Governments, subject to the condition that 1s. 9d. the rupee is fixed as the minimum rate at which the conversion into sterling shall be effected. Any payments made at a different rate or otherwise erroneously, should be adjusted in subsequent payments.

NOTE 1.—[The same rate of exchange applies to the issue of gratuities to persons residing in any country in which the rupee is not legal tender ; but when the service of an officer to whom a gratuity is granted terminates in India, the gratuity should be paid in India.]

NOTE 2.—[Notes 1 to 3 under Article 934 apply, *mutatis mutandis*, to this Article.]

NOTE 3.—[On warrants issued to persons drawing pensions stated in rupees it should be noted whether payment is subject to the minimum rate of 1s. 9d. the rupee.]

Transfer of Payment.

972. (a) Transfer of a pension from an Indian treasury to a Colony the payments in which are adjusted in the accounts of the Home treasury is permitted only once; but a pensioner can at any time have payment transferred from a Colony to an Indian treasury, or from a Colony the payments in which are adjusted in the accounts of the Home treasury to England for direct payment from the Home treasury.

(b) In case a pensioner desires transfer of payment of his pension from one Colony to another, the Government of India will recognise the proceedings of the Colonial authorities sanctioning such transfer which should, however, be reported separately by the pensioner to the Government of India and to the Under-Secretary of State for India.

973. Upon his return to India an officer should deliver up his copy of the warrant, which will serve the purpose of a last-pay certificate.

Chapter XLIX.—Pensions to Members of the Indian Civil Service.

SECTION I.—APPLICATIONS.

Retirement while on duty in India.

974. An officer on the Bengal Establishment who is not borne on the rolls of the Government of India, shall submit his application to the Government of India in the Department under which he is serving, and the Department receiving the application will forward it, with any remarks that may be necessary, to the Home Department, which should obtain the report of the Comptroller, India Treasuries, upon the officer's claim in respect of service and active service and also as to whether there are any demands against him on account of the deduction prescribed in Article 556, or on any other account.

975. An officer on the Madras or Bombay Establishment, or on the Bengal Establishment who is borne on the cadre of the Bengal Presidency, if he be in India, shall submit his application to the Government of Madras, Bombay or Bengal, as the case may be, who will obtain the report of the Accountant-General and the No-demand Certificate as provided in Article 974.

976. Any other officer on the Bengal Establishment, if he be in India, shall submit his application to the Local Government under which he may be serving; and the Local Government will forward the application, with any observations which may be necessary, to the Government of India in the Home Department, together with a No-demand Certificate from the Accountant-General.

1 When preparing the No Demand Certificate, the Accountant General should send the officer a copy of Article 991.

Retirement during leave to Europe.

977. (a) An officer, who wishes to retire from the Service while on leave in Europe, must submit his application to the Secretary of State.

(b) When an officer makes his application under this Article, whether

him in India; and he is directed to apply to the Government of India, the Government of Madras, the Government of Bombay or the Government of Bengal, as the case may be, for the annuity or gratuity to which his length of service may entitle him.

Grant of Pension.

India, in which Department the annuity or gratuity to which the officer is entitled will be sanctioned

(b) The copy of the sanctioning order forwarded to the officer will be his authority for drawing his annuity or gratuity

(c) In the case of an officer on the Madras or Bombay Establishment, or on the Bengal Establishment if borne upon the cadre of the Bengal Presidency, the annuity or gratuity will be sanctioned by the Government of Madras, Bombay or Bengal, as the case may be.

SECTION II.—PAYMENT.

979. The annuity of an officer who leaves India by sea, when retiring from the Service at the end of subsidiary leave, begins, and his subsidiary leave ends, on the day of the departure of the vessel in which he sails

cadres —

- | | |
|---|---|
| 1. Name of officer | 4 Date up to (and including) which subsidiary leave allowances have been drawn. |
| 2 Date on which he made over charge of his office | 5 What demands, if any, are outstanding against the officer] |
| 3 The amount of subsidiary leave granted, if any | |

980. The annuity of a Member of Council who has not previously resigned his seat in Council, or whose successor has not entered upon his office, commences from the day following that on which the vessel in which he leaves India sails, or from the expiry of his five years' tenure of office, whichever date is earlier.

981. An officer on resigning the Service must report the place at which the payment of his annuity is desired, and if he is leaving India, the date of the departure of the vessel in which he sails. The report must be made to the Government of India in the Finance Department in the case of an officer not borne on the cadre of the Madras, Bombay or Bengal Presidencies and to the Government of Madras, Bombay or Bengal, if he belongs to the Madras, Bombay or Bengal cadres

982. Annuities are payable in arrear, monthly, and to date of decease.

983. (a) Payment of annuities and gratuities may be taken at the Home treasury in sterling money, or in India in rupees, at the following rate :—

- (i) If the annuitant was on the Bengal Establishment,—10½ rupees for each pound sterling.
- (ii) If the annuitant was on the Madras or Bombay Establishment,—10 65 rupees for each pound sterling.

NOTE.—[The rates specified in this clause were fixed by Statute 37 Vict. c. 12.]

(b) Provided that any annuitant who resides in India, whether permanently or temporarily, and wishes to draw his annuity in that country, may exercise the option of receiving it at the rate of exchange fixed for the adjustment of transactions between the British and Indian Exchequers.

NOTE.—[This rule applies to all officers whose pensions are stated in sterling, and who, being resident in Asia, take payment in India.]

984. Transfer from the Home treasury to an Indian treasury, and vice versa, is permitted twice only.

985. Whenever a certificate is issued for the payment of an annuity from the Home treasury, the amount of the annuity must be stated in pounds sterling and not in rupees, and, in the case of transfer of payment from India to the Home treasury, it must be distinctly recorded that no further payment on account thereof will be made in India.

986. An officer who resigns the Service while he is in Europe, and who has completed the requisite period of service and residence, and elected to draw his annuity from the Home treasury, can obtain advances from the Secretary of State for India, pending receipt of the authorities referred to in Article 978.

987. Payment of annuities may be made in any Colony named in Appendix 15 in accordance with the procedure laid down in Articles 966 to 973.

Chapter L.—Pensions to Chaplains.

988. Application may be made to, and pensions are granted by, the Government of India, Local Governments or by the Secretary of State as the case may be.

NOTE.—[A Chaplain who proceeds to Europe on leave should give four months' notice if he decides to retire without returning to India.]

leave, and, if the latter, for what period

989. A Chaplain proceeding to England on retirement, without applying for pension, should procure a certificate in Form 30—

- (i) From the Accountant General of the Province in which he is serving or has last served.
- (ii) In the case of the Archdeacon of Calcutta or the Presidency Senior Chaplain, Church of Scotland, Bengal, from the Comptroller, India Treasuries.

990. A Chaplain who wishes to obtain pension from the authorities in India must, if he belongs to the Church of England, submit his application through the Archdeacon or Bishop of his Diocese, or if he belongs to the Church of Scotland through the Presidency Senior Chaplain, to the Local Government under which he is serving or has last served.

The Archdeacon of Calcutta or the Presidency Senior Chaplain, Church of Scotland, Bengal, will submit his application to the Government of India in the Department of Education.

991. *Cancelled.*

992. The Department of Education or the Local Government before accepting the resignation of a Chaplain should obtain a certificate from the Comptroller, India Treasuries, or the Accountant General concerned, showing the Chaplain's service, residence and the amount of pension to which he is entitled.

993. (a) In the case of the Archdeacon of Calcutta and the Presidency Senior Chaplain, Church of Scotland, Bengal, the case should be forwarded to the Finance Department of the Government of India in which Department the pension to which the Chaplain is entitled will be sanctioned.

(b) In the case of other Chaplains the pension will be sanctioned by the Local Government concerned.

994. A Chaplain to whom pension has been granted in India should be careful before proceeding to England to obtain the usual certificate of the last issue of pay or pension to him in India.

PART XI.—REGULATIONS RELATING TO TRAVELLING ALLOWANCES.

GENERAL ARRANGEMENT.

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PART XI.—REGULATIONS RELATING TO TRAVELLING ALLOWANCES.

Chapter LI.—Definitions and General Rules.

SECTION I.—PRINCIPLES OF CALCULATION.

995. Travelling allowance is given to an officer to cover the actual travelling expenses incurred by him in travelling in the interests of the public service. It is a fundamental principle that the allowance is not to be a source of profit, and, save as specially provided in these Regulations, no allowances are granted to meet the expenses of the families of officers accompanying them when travelling on duty.

Route for calculation of Travelling Allowance.

996. (a) For the purpose of calculating travelling allowance, a journey between two stations is held to be performed by the shortest of two or more practicable routes, or by the cheapest of such routes as may be equally short.

NOTE.—[Where there are alternative railway routes, and the difference between them in point of time and cost is not great, travelling allowance should be allowed for the route actually used.]

(b) The shortest route is that by which the traveller can most speedily reach his destination by the ordinary modes of travelling. In case of doubt the Head of the Department concerned will, in respect of journeys within his jurisdiction performed by officers under his control, declare which shall be regarded as the shortest of two or more routes.

(c) If an officer travels by a route which is not the shortest, but which is cheaper than the shortest, his travelling allowance is calculated by the route by which he makes the journey.

997. The Local Government, or the Head of the Department in the case of journeys within his jurisdiction performed by officers under his control, for special recorded reasons, may permit travelling allowance to be calculated by a route other than the shortest or cheapest, provided that the journey is actually performed by such route.

NOTE.—[In the case of journeys between stations which are in the jurisdiction of different Local Governments, Heads of Departments under whose orders transfers are made from one Province to another may exercise the powers of a Local Government under Articles 996 and 997.]

998. The point in any station from which a journey is held to commence, or at which it is held to end, is the chief public office or any other point fixed for the purpose by the Local Government.

NOTE.—[See Note under Article 1065 (iii) (1).]

When means of locomotion are supplied.

999. (1) An officer who is provided with and avails himself of means of locomotion at the expense of Government, a local fund or a Native State, and does not pay the expenses of its use or propulsion, draws travelling allowance as follows :—

- (a) If he has not to provide separate conveyance at his own expense for his servants or luggage, he draws the daily allowance ordinarily admissible to him and is not entitled to exchange the daily rate for mileage under Article 1065. But if part of the journey is performed by other means of locomotion he may at his option draw in lieu of daily allowance the travelling allowance admissible for that part.
- (b) If he has to provide separate conveyance at his own expense for his servants or luggage, he may, under Article 1065, exchange his daily allowance for half the mileage ordinarily admissible to him and may draw in addition the travelling allowance admissible for any part of the journey performed by other means of locomotion.

Note. (1) The officers of motor cars supplied by Government (either under the rules promulgated in the Resolution in the Finance Department No. 250-E A., dated the 15th July 1912, or under the rules of a local fund, when performing a journey as above only if the journey is performed by other means of locomotion) are not entitled to draw travelling allowance.

(2) An officer provided with the means of locomotion as in clause (1) who pays all expenses of its use or propulsion is entitled to travelling allowance under the ordinary rules, subject to the deduction therefrom of such fixed hire or charge as the Local Government, or the Head of an Imperial Department in respect of journeys within his jurisdiction performed by officers appointed by him and under his control, may fix.

(3) Table money under Article 1023 is granted to officers of all but the first class in Burma travelling by Government steam launch on transfer in addition to any allowance admissible under this Article.

999-A. The above Article does not apply to—

- (a) Officers using motor cars supplied at the public expense under the rules promulgated in the Resolution in the Finance Department No. 250-E A., dated the 15th July 1912. The travelling allowance of such an officer is regulated by the ordinary rules, subject to the following conditions :—
 - (1) If he travels more than twenty miles by the motor car in a day, he will draw for the first twenty miles the mileage allowance ordinarily admissible under these Regulations, and for the remainder three-fourths of the mileage allowance so admissible.
 - (2) If a journey by the motor car is combined with a road journey by ordinary conveyance, the officer will draw the mileage allowance ordinarily admissible for the first twenty miles or for the portion of the journey performed by ordinary conveyance, whichever is

Military Commissioned and Departmental officers, Chaplains, the officers mentioned in Appendix 18, and any other officer who holds an appointment the pay or maximum pay of which exceeds Rs. 500.

Second.—The second class includes Warrant officers, Non-Commissioned officers, Civil Assistant Surgeons, Civil Apothecaries in Madras, Probationary and Assistant Superintendents of the Post Office, Probationary Assistant Superintendents of the Jail, and other officers of the same rank as the following:

Collectors in

Schools in

Inspectors of

spectresses

tendents

Orissa, P.

the Jail

Assistant

Superintendents

and Sub-Inspectors

(Rs. 50-100), acting as

Inspectors of the

combined Excise and Salt

Department, Bengal, qualified

students of the

Thomason College under

practical training, Headmasters

of Government

High Schools in Assam, and

any other officer, not included

in the first class, who holds

an appointment the pay or

maximum pay of which exceeds

Rs. 100.

Third.—The third class includes all officers in superior service not included in the first or second class and jail warders in the Bombay Presidency drawing more than Rs. 10 a month.

Fourth.—The fourth class includes all officers in inferior service.

Note 3.—[The following Police subordinates are held to be in superior service if their pay exceeds Rs. 10 a month:—

(a) Of rank higher than constable, everywhere.

(b) Of the rank of constable in the Aden and Makhi Dhand Police.

(c) Mounted constables in Sind.]

Note 4.—[Forest Guards are held to be officers of the fourth class even in cases where their service is specified as superior.]

from their homes, draw for journeys by rail double second class fare, and for journeys by road four annas a mile. They may also draw, under the usual rules, a daily allowance of Rs. 3 during halts when employed, at a distance exceeding five miles from their residences, on Government work; whether judicial or extra-judicial, under the orders of the district or sub-divisional magistrate.

1004. The Local Government may grant travelling allowance under these Regulations to any person, who is not a Government official and who may be required to attend any meeting of a Commission of Enquiry or of a

Board, Conference, Committee or departmental enquiry, convened under (or with reference to) its orders to transact or advise upon matters of public business or to conduct examinations held under its authority, or who may be required to perform any public duties in an honorary capacity; and may for this purpose declare, by general or special order, to what class such a person belongs and to what daily allowance he is entitled, subject to the condition that the ordinary daily allowances for officers of the first and second classes, respectively, shall not exceed Rs. 5 and Rs. 3. It may also, at its discretion, grant such a person, in lieu of travelling allowances under these Regulations, the travelling, hotel and carriage expenses actually incurred by him.

NOTE 1.—[The grant of travelling allowance under the Regulations is desirable, as far as possible, in all cases falling under this Article, as it avoids correspondence and tends to facility of audit.]

NOTE 2.—[The Local Government may delegate its powers under this Article to the Head of the Department concerned, or to the Government officer presiding over the meeting of the Commission, etc.]

1005. The Local Government may declare to what class an officer, whose whole time is not retained for the public service, or who is paid partly or wholly by fees, belongs, and to what daily allowance such an officer is entitled: provided that the ordinary maximum daily allowances for officers of the first and second classes, respectively, are Rs. 5 and Rs. 3.

1006. An officer on special duty belongs, in the absence of a special order of the Local Government to the contrary, to the class to which he belonged immediately before he was placed on such duty.

1007. An officer during transfer from an appointment in one class to an appointment in another class belongs to the class to which he would belong if holding the lower of the two appointments.

Temporary Employés.

1008. A person employed temporarily, by competent authority, is entitled to travelling allowances under the rules applicable to officers of corresponding rank with permanent appointments.

Combination of Appointments.

1009. An officer holding, either temporarily or permanently, two separate appointments is entitled only to the travelling allowance attached to one of them; but in the case of permanent allowances, the Local Government may grant such a person, in lieu of travelling allowances under these Regulations, the travelling, hotel and carriage expenses actually incurred by him.

1010. An officer holding, either temporarily or permanently, two separate appointments is entitled only to the travelling allowance attached to one of them; but in the case of permanent allowances, the Local Government may grant such a person, in lieu of travelling allowances under these Regulations, the travelling, hotel and carriage expenses actually incurred by him.

(a) An Assistant or a Deputy Superintendent of Police placed in charge of the office of a District Superintendent may draw the travelling allowance

of a District Superintendent, and an Inspector placed in charge of the office of a District Superintendent, Assistant Superintendent or Deputy Superintendent may draw the travelling allowance of a Deputy Superintendent.

(b) An officer in the Survey of India, whatever his substantive rank may be, draws when in charge of a Survey Party, the travelling allowance of a Deputy Superintendent.

(c) A certain number of upper subordinates in the Buildings and Roads and Irrigation Branches, respectively, of the Punjab, the United Provinces, Bihar and Orissa and Bengal, according to a scale sanctioned from time to time by the Government of India in the Public Works Department, when placed in charge of districts or sub-divisions, are allowed travelling allowance at the rates admissible to Assistant Engineers, or Sub-Engineers, as may be ordered by the Local Government. Lower subordinates of the United Provinces, Buildings and Roads Branch, when similarly placed in charge of districts or sub-divisions, within the scale referred to above, draw travelling allowance at similar rates. Subordinates and Inspectors of Maintenance of the North-Western and Oudh and Rohilkhand Railways, when placed in charge of sub-divisions or sub-districts, also draw travelling allowance at the rates admissible to Assistant Engineers.

(d) A lower subordinate placed in charge of a properly constituted sub-division in Bengal, in Bihar and Orissa or in Burma may be granted the same travelling allowances as an upper subordinate when the necessity for such an arrangement arises in consequence of the paucity or absence of upper subordinates.

1. The Local Government may delegate its power under this Article to the Head of a Department or Commissioner of a Division.

Chapter LII.—Mileage Allowances.

NOTE.—[The rules in this Chapter are rules of calculation only; that is, they prescribe the method of calculating travelling allowances in those cases in which they are regulated by the distance travelled. The succeeding Chapters must be referred to for a definition of the circumstances under which the title to the allowances accrues.]

SECTION I.—TRAVELLING BY RAILWAY.

1011. Officers travelling by railway on duty are entitled to class accommodation according to the following scale:—

- (a) *Officers of the first class.*—Highest class accommodation (by whatever name called) provided on the line by which the officer is required to travel.
- (b) *Officers of the second class.*—Second or, where on the line by which the officer is required to travel second class accommodation is not provided on any of the trains, first class.

- (c) *Officers of the third class*—Intermediate class, or if on the line by which the officer is required to travel no “intermediate” class accommodation is provided on any of the trains then—
- (i) where there are only two classes,—lower class ;
 - (ii) where there are three classes — second class, if the officer's pay or maximum pay is not less than Rs. 50 ; otherwise, third class.
- (d) *Officers of the fourth class*.—Lowest class whether called lower, third, or fourth.

NOTE 1.—On the Darjeeling-Himalayan Railway all officers of the third class are entitled only to third class accommodation.

less than Rs. 50 and who travels on a line which provides intermediate accommodation on one or more of its trains, but by a particular train which has no intermediate class, is not entitled to the above concession. He will be restricted to travelling allowance based on intermediate class accommodation and can draw the travelling allowance admissible for second class accommodation, only in the event of there being no third class on the train.

(b) Observers and clerks of the Meteorological Department when touring on inspection duty are entitled to second class accommodation if they actually travel by that class on account of their having valuable or delicate instruments with them

(c) Deputy Inspectors of Schools in Bengal and Bihar and Orissa, permanent or temporary, are allowed 2nd class accommodation

1012. The allowance admissible to an officer of the first, second, or third class is double the fare of the class in which he is entitled to accommodation, and to an officer of the fourth class the fare of the lowest class.

Exception—The undermentioned Revenue and Forest officers in Madras receive mileage at the following rates when travelling by railway with camp equipment, including tents, within their jurisdiction.—

	ANDAS.
Collectors and Conservators	6
Sub-Collectors, Assistant Collectors, Deputy Conservators, Assistant Conservators when placed in charge of Forest Divisions or employed as Instructors at the Forest College, Combaratore, and Forest Settlement Deputy Collectors	4
Deputy Collectors and Assistant Conservators	3

1013. When an officer is entitled to or is allowed free transit by rail his travelling allowance must, save as otherwise provided in Articles 1067 to 1069, be reduced by the amount of the fare which but for such free transit he would have paid.

NOTE 1.—[This Article applies to every case not covered by a specific rule to the contrary, in which an officer is provided with a free pass, and not merely to the case of free passes granted on railways which are worked directly by Government.]

NOTE 2.—[The deduction made from travelling allowance under this Article shall ordinarily be for the full number of fares covered by the pass; that is, in the case of a 1st class

pass, one first and two third class fares, and in the case of a 2nd class pass, one second and one third class fare. If the deduction made on any bill is less, the officer drawing the bill must attach a certificate that he did not use the pass in respect to the fare or fares for which the deduction is not made.]

1 Police Inspectors and Sub-Inspectors in Bombay employed exclusively on railways are not liable to have their allowances reduced when they use a free pass.

1014. When an officer is entitled to travel in a higher class at a lower fare, his travelling allowance must be reduced by the amount by which the fare of the class in which he travels exceeds the fare actually paid.

Unopened Lines.

1015. (a) An officer of the State Railways or the Telegraph Department travelling on an unopened line of railway by trolley, material train, or engine, draws, in addition to the actual cost of haulage (if any), the following mileage allowances, *i.e.*—

If an Officer of the first class	.	.	.	.	1½ annas.
Ditto second class	.	.	.	.	9 pies.
Ditto third or fourth class	.	.	.	.	3 „

(b) This Article is not applicable to officers of the Consulting Engineer's Department, or to officers attached to open lines of railway.

(c) An officer cannot draw any other allowance in lieu of, or in addition to, this special allowance, except—

- (i) when he makes a journey of less than twenty miles partly by trolley and partly by road in which case he can only draw daily allowance, for the whole journey; * and
- (ii) when he remains absent from head-quarters for a night, in which case he can draw, at his option, either daily allowance, or the allowance admissible under this Article;
- (iii) when the conditions of Article 1061 (a) are satisfied, in which case he may draw also the allowances admissible under that Article.

NOTE.—[The special allowance admissible under this Article is not affected by Article 999.]

SECTION II.—TRAVELLING BY SEA OR RIVER.

1016. An officer when travelling by sea or in a river steamer, is allowed either free accommodation or the amount of passage money actually paid for accommodation, on the undermentioned scale:—

(a) *Officer of the First Class.*—First class for himself, and lowest class for two or, if his salary is not less than Rs. 1,000, three servants.

* When the journey is more than twenty miles and is made partly by road and partly by trolley, the allowances are regulated by Article 1065 (iii)

(b) *Officer of the Second or Third Class.*—Middle or second class for himself and lowest class for one servant.

If there are only two classes of accommodation in a steamer an officer of the second class of

(c) *Officer of the Fourth Class*—Lowest class.

1017. The preceding Article is subject to the following provisos:—

(a) An officer of the second class whose pay is not less than Rs. 200, may elect for any journey to claim accommodation under clause (a), in which

Page 291. Article 1017.

Insert the following Note to this Article:—

NOTE.—[Local Governments may grant, at their discretion, to assistant inspectresses of schools and female inspecting officers of similar position travelling allowance at first class rates.]

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velling on duty by sea in that capacity, may reserve the same to be used by them in securing reserved accommodation up to an amount not exceeding double that admissible as passage-money for themselves under Article 1016 (a).

1019. The Travelling Inspector of Emigrants, Assam, while actually engaged on the duties of Travelling Inspector, may draw first class fares for journeys by steamer.

1020. In cases of doubt or in cases in which, owing to the arrangement of the classes on the steamer, the rules, if construed strictly, involve hardship, the Local Government, or the Head of a Department in respect of non-gazetted subordinates, has power to decide what class of accommodation any particular officer should be allowed.

1021. Except as provided in Articles 1000, 1094 (Exception 1), and 1098, no more personal luggage can be carried at the expense of the State than the quantity the freight on which is included in the charge for passage.

Table-money.

1022. If board is provided on the vessel either by its owners or Commander or otherwise, the charge for such board, whether actually included in the passage-money or not, is reckoned as passage-money for the purpose of Articles 1016 to 1021, but in that case table-money is recovered from an officer of the first class (other than a native of India, hindered by caste or other scruples from availing himself of the board so provided) at the following rates for every day on which dinner is provided for him on board:—

(i) If the board includes wines and liquors, three-twentieths of salary up to a maximum of Rs. 8.

(ii) Otherwise, three-fortieths of salary up to a maximum of Rs. 4.

NOTE.—[In the case of Political Officers in the Persian Gulf and at Muskat travelling on duty in H. M.'s ships or R. I. M. vessels, table-money is recovered at the rate of three-fortieths of salary up to a maximum of Rs. 4 a day whether board includes wines or not.]

1023. If board is not provided on the vessel, or, though provided, cannot, owing to caste or other religious scruples, be availed of, an officer of the second, third, or fourth class is entitled to table-money for every day on which he dines on board—

- (i) At the rate of daily allowance prescribed in Article 1063, subject to a minimum of four annas for himself and for each member of his family for whom passage money is admissible and who is not less than six years of age; and
- (ii) At half such rate for each such member of his family who is less than six years of age.

Explanation—Table-money is not recovered from an officer of the second, third, or fourth class in the case mentioned in Article 1022, nor paid to an officer of the first class in the case mentioned in Article 1023.

1024. Port Officers when travelling on detached duty are not subject to any deduction on account of table-money if board is provided on the vessel; and, if board is not provided, they are entitled to table-money at the rates of daily allowances prescribed in Appendix 25.

1025. A second class passenger is not entitled to be supplied with mess at the Commander's table, unless no other mess is provided on the steamer.

1026. When the route by which an officer is entitled to draw travelling allowance embraces a journey by sea which is not actually undertaken (whether owing to the officer's not travelling by the direct route or otherwise), table-money should be recovered from or paid to such officer for the average number of days which the passage occupies, such average, in case of doubt, being determined by the Local Government.

NOTE.—(Articles 1022 to 1026 regarding the recovery of table-money apply to voyages in the neighbourhood of India only.)

1027 and 1027A. *Cancelled*

Government vessels.

1028. An officer is bound to travel in an Indian Government vessel, if suitable accommodation be offered to him.

1029. An officer travelling otherwise than on payment of passage-money in a vessel, the cost of which is paid by the State or Local Funds, is subject to the rules regarding scale of accommodation in Articles 1016 and 1017 and table-money in Articles 1022 and 1023. But the travelling allowance of an officer travelling in a vessel, the crew of which is paid by himself and not by the State or Local Funds, is regulated by Article 999.

1030. The rates payable to Commanders of Government vessels for the entertainment on board of officers of the first and second classes together with their families and servants, and all officers in inferior service, when such officers travel as ordinary passengers, and the rates payable for the entertainment on board a vessel of the Royal Indian Marine of officers travelling on special occasions are contained in Appendix 19.

Crossing River or Arm of the Sea by Steamer.

1031. The rules in this section apply to an officer crossing a river or arm of the sea by steamer in the course of a journey; but when such crossing occurs in the course of a railway journey, and the charge therefor is included in the railway fare, the rules in Section 1 of this Chapter are applied.

Embarking and Disembarking.

1032. In addition to passage-money an officer travelling by steamer is reimbursed the actual expenses incurred by him in embarking and disembarking, i.e., the charges from the quay to the vessel, such as wharfage fees, boat-hire, and the like. Charges incurred on shore are not reimbursed.

SECTION III.—TRAVELLING BY ROAD.

1033. Travelling by road includes travelling by sea or river otherwise than on a steamer (e.g., by steam launch or by boat), and travelling by canals.

Ordinary Mileage Rates.

1034. For journeys by road, mileage allowance is calculated at the following rates :—

Officers of the 1st class	: 8 annas	Officers of the 3rd class	: 2 annas
„ „ 2nd „	: 4 „	„ „ 4th „	: 1 anna

provided that (except in cases of transfer) a non-gazetted ministerial or a menial officer is only entitled to actual travelling expenses not exceeding the rate for his class. [See Rule 1 under Article 1065 (ii).]

1035. In calculating travelling allowance at mileage rates, fractions of a mile should be omitted, but only in the total of a bill for any one journey, and not in the various items which make up the bill

Special Mileage Rates.

1036. (a) The undermentioned Revenue and Forest officers in Madras receive mileage at the rates shown below when travelling on tour within their respective districts or charges :—

	Without tents. Annas.	With tents. Annas.
Collectors and Conservators	8	12
Sub-Collectors and passed Assistant Collectors, Deputy Conservators, Assistant Conservators when placed in charge of Forest Divisions or employed as Instructors at the Forest College, Coimbatore, and Forest Settlement Deputy Collectors	8	8
Unpassed Assistant Collectors, Deputy Collectors, and Assistant Conservators	4	6

(b) The following officers also draw mileage at the special rates shown :—

	Annas.
Junior Port Officers in Madras	8
Overseers in the Public Works and Railway Departments	2

2. A Chaplain proceeding to a distance from head-quarters to solemnise a marriage; or a medical officer leaving his station to attend upon the family of a public officer, which he is not bound to attend free of charge as a part of his regular duties, is not travelling on duty within the meaning of this Article.

1039. The pay of the officers named in Appendix 20 has been fixed so as to compensate them for the cost of ordinary journeys (other than journeys by rail or steamer) within their respective jurisdictions, and they are not entitled to travelling allowance for such journeys. When travelling by rail or steamer within jurisdiction, they are entitled to travelling allowance under Articles 1011 to 1032. When proceeding under proper authority beyond their jurisdiction, they are entitled to travelling allowance for their entire journey, including such part of it as is within their jurisdiction.

NOTE 1. The pay and allowances of officers named in the Appendix are subject to the provisions of the Appendix.

travelling allowance admissible to officers of their class.]

1040. The Local Government is empowered to add to the list of officers in Appendix 20 subject to confirmation, on report of its proceedings to the Government of India

Limits of Ordinary Jurisdiction.

1041. A Local Government may fix the limits of ordinary jurisdiction for, and impose restrictions upon, the duration and frequency of the journeys on any specified duty of any officer or class of officers.

Tents.

1042. (a) The Local Government or the Head of an Imperial Department in respect of his subordinates, is empowered to lay down the scale of Government tents to be supplied for the use on tour of any particular officer or class of officers for office and, if it think fit, private purposes.

(b) When tents which are the property of Government are used only for office purposes by an officer on tour, they are carried at Government expense. When they are used partly for office and partly for private purposes, the officer using them must, save as provided in Article 1000, pay half the cost of carriage. When they are used wholly for private purposes, the officer using them must, unless the case is met by Article 1000, pay the whole cost of carriage.

1043. *Cancelled.*

SECTION II.—PERMANENT ALLOWANCES.

1044. A permanent monthly travelling allowance is granted in lieu of all other travelling allowances for journeys within an officer's circle of duty, and is drawn all the year round, whether the officer entitled to it is at the time absent from his head-quarters or not. Officers in receipt of such

allowance should deduct from the amount drawn each month, the value of the fares for any railway journeys for which they have used a free pass during the month.

Exceptions—The following officers who draw permanent monthly travelling allowance may draw single fare for a journey by rail in addition —

(a) District Inspectors of Excise in the Central Provinces, provided the Deputy Commissioner certifies that the journey by rail was necessary and that the Inspector has duly earned the monthly allowance.

(b) Sub-Inspectors of Police in Bombay employed exclusively on railways

(c) District Inspectors of Schools in the Punjab—with the special sanction of the Postmaster-General for journeys made by them as Inspectors of School Post Offices.

(d) Munshis and clerks attached to Canal Divisions of the Public Works Department and Sub-divisional clerks and munshis on the establishment of the Executive Engineer, Kumaon Government Estates, United Provinces

(e) Officers of the fourth class

1045. The Local Government may, either by a general order applying to a class of officers or by a special order, permit an officer whose circle of duty extends beyond the limits of a single district, to draw, whenever his actual travelling expenses for a duly authorised journey on duty by public conveyance exceed double the amount of his permanent allowance for the period occupied in such journey, the difference between such double permanent allowance and the allowances admissible under Chapter LII in addition to his ordinary permanent allowance for such period.

1048. An officer in receipt of a permanent monthly allowance may, when proceeding, under proper authority, beyond his jurisdiction, exchange his permanent allowance for the entire journey, including such part of it as is within his jurisdiction, for the allowances admissible under Article 1055, the daily allowance being taken to be one-thirtieth of the permanent monthly allowance.

1047. A permanent monthly allowance of any other kind ~~may~~ ^{shall} be drawn in lieu of any other travelling allowances admissible under these Regulations.

1048. Permanent monthly allowances are granted to the officers named in Appendix 22 at the rates shown therein.

Additions to this Appendix can be made only with the sanction of the Government of India.*

1049. (a) The Local Government may grant to a Forest officer, in lieu of other travelling allowance, a permanent allowance, according to the following scale :—

[illegible]

* The rule in this Article is to be read as superseded or revised by the Resolutions defining the powers of the Government of India and Local Governments in this matter. No amendment has, however, been made in this reprint pending a general revision of the Code.

	Rs
(ii) If an Extra Assistant Conservator elsewhere than in Bombay, or a probationer for the Provincial Forest Service	75 a month
(iii) If below the rank of Extra Assistant Conservator	50 „
To an officer in charge of a sub-division or range—	
(i) If not below the rank of Extra Assistant Conservator or a probationer for the Provincial Forest Service	60 „
(ii) If below the rank of Extra Assistant Conservator	20 „

(b) Where a charge is specially extensive, or travelling is unusually costly, the above scale may be increased, with the previous sanction of the Government of India, by twenty-five or fifty per cent.

1050. Conservators of Forests in the Madras Presidency may grant a Deputy Ranger or a Forester not in charge of a Range a permanent monthly travelling allowance not exceeding Rs. 8. Conservators of Forests and Deputy Conservators in charge of circles in the Bombay Presidency may grant a Forester, whose pay is not less than Rs. 15 per mensem and who is not in charge of a Range, a permanent monthly travelling allowance not exceeding Rs. 10.

1050A. The Government of Burma may grant a permanent monthly allowance to all officers of or below the rank of Inspector in the various Settlement and Survey establishments (including clerks and menials), as well as to Demarcation Officers and their clerical and menial establishments, subject to the conditions that the maximum in any case shall not exceed Rs. 30 and that only half rates shall be admissible during the recess season.

NOTE.—[The Local Government may delegate its power under this article to the Financial Commissioner in respect of temporary establishments which he is competent to sanction.]

1051. Munshis and clerks attached to Canal Divisions of the Public Works Department and sub-divisional clerks and munshis on the establishment of the Executive Engineer, Kumaon Government Estates, United Provinces, who are liable to be at any time required to go on tour, may, at the option of the Local Government, be granted a permanent monthly allowance of Rs. 10, in lieu of all other travelling allowance

NOTE.—[Munshis and clerks stationed beyond the external boundaries of the Hazara, Peshawar, Kohat, Dera Ismail Khan or Dera Ghazi Khan districts, receive a permanent monthly allowance of Rs. 15, with the sanction of the Local Government in each case.]

SECTION III.—DAILY ALLOWANCES—CONDITIONS.

1052. (a) A daily allowance is intended to cover the ordinary daily charges of an officer on tour; it is drawn only during absence from head-quarters on duty, including the period of halts on duty, or on an authorised holiday, during such absence.

(b) Save where otherwise expressly provided, daily allowance is inadmissible for journeys, or halts in the course of journeys, under any other Chapter of these Regulations.

1053. The period of absence which the officer actually leaves he returns to them. It is not reckoned as camp equipage.

1054. (a) The Local Government's orders at head-quarters, contained in and certificates therein specified (including) restrictions as may seem requisite, in relation to the departure from, or arrival at, the camp equipage.

(b) In the case of officers in Simla, the provisions of Article 1059 apply between the engagement of camp equipage on tour.

NOTE.—[See note under Article 1059]

1055. No travelling allowance, other than a daily allowance, is admissible for any day on which exceeding five miles from head-quarters, exceeding five miles. But an officer travelling from head-quarters is entitled to draw the amount of ferry and other tolls or railway fare

Exceptions—1 No travelling allowance, other than a daily allowance, is admissible to a District or Assistant District Superintendent, otherwise than in the course of a tour, unless he is in this clause "Tour" means a journey which involves two or more consecutive nights, and the visitation of two or

with first class Subordinate Judges' Courts, and Veterinary dispensaries are exempted from the operation of this rule to Revenue Inspectors in the Madras Presidency.

NOTE.—[The term "general-duty Karkun" applies to any member on the establishment of a Mamlatdar or Mahalkari occasionally deputed to any part of a taluka for any special enquiry or purpose when the duty for any reason cannot be performed by a Circle Inspector.]

Halts during Tour.

1056. A daily allowance may not be drawn for more than ten days of a halt at one place. But general or individual exemptions from the operation of this rule may be sanctioned by the Local Government by a general rule or order, where they are satisfied—

- (a) that prolonged halts are necessary in the interests of the public service, and
- (b) that such halts necessitate the maintenance of camp equipage or, where no camp equipage is maintained, entail extra expense on the officer after the first ten days.

Similar exemptions, subject to the same conditions, may be granted in individual cases up to a limit of 30 days by Imperial Heads of Departments and Provincial Heads of Departments, Commissioners of Divisions, Settlement Commissioners, and Superintending Engineers to whom the Local Government may delegate authority for this purpose.

It is open to the authority sanctioning the exemption to lay down any limits or conditions, which it may think fit to impose; for instance, when an exemption is made under this Article, the full daily allowance admissible under rule may be reduced by such an amount, and may be granted for such number of days, as the sanctioning authority may deem proper in each case.

NOTE 1.—[A general-duty Karkun in Bombay draws daily allowance for the first 120 days of absence from head-quarters in each financial year, irrespective of the limitation imposed by this Article. For halts after the first 120 days, the limitation applies.]

NOTE 2.—[As regards officers in (a) the Geological Survey Department, (b) the Central Criminal Intelligence Department, and (c) the Meteorological Department, the Head of the Department exercises the powers of a Local Government under this Article.]

NOTE 3.—[The Resident at Baroda exercises the powers of a Local Government under this Article as regards officers serving under him on boundary settlement work.]

NOTE 4.—[The Chief Inspector of Mines may exempt the clerks of his office from the opera-

1057. (a) For the purpose of Article 1056 a halt is continuous unless terminated by an absence at a distance exceeding 5 miles for a period including not less than three nights.

(b) In calculating the ten days referred to in that Article any day on which the officer travels or halts outside the five miles radius is to be excluded. For such a journey or halt the officer may draw daily allowance or, if he is entitled to them, allowances under section 5, Chapter LIII.

(c) After the expiry of ten days an officer may draw travelling allowance under the ordinary rules for journeys from the halting place even though followed by a return to it.

NOTE.—[In Articles 1056 and 1057, the halting place for the purposes of Article 1033 should be considered to be the officer's temporary head-quarters.]

1058. A list of officers and establishments who have been exempted from the rule in Article 1056, conditionally or unconditionally, will be found in the Manuals of the local audit officers concerned.

Head-quarters.

1059. (a) A Local Government may, by general or special order, permit any officer or class of officers to draw, during a halt at head-quarters, the actual expense (not exceeding the daily allowance) of keeping up camp equipment (when it is necessary to do so) during a halt: provided such actual expense may not be drawn for a longer period than twenty-one days in Sind or Rajputana, and ten days in other places.

Explanation.—A halt is not interrupted for the purpose of this rule by an absence on duty from the place of halting for less than three nights.

1053. The period of absence which the officer actually leaves he returns to them. It is not reckoned as camp equipage.

1054. (a) The Local Government a halt at head-quarters, contained and certificates therein specified (restrictions as may seem requisite, the departure from, or arrival at, he equipage.

(b) In the case of officers in Simla, apply the provisions of Article 1039 between the engagement of camp equipage quarters on tour.

NOTE—[See note under Article 1039]

1055. No travelling allowance, other than, is admissible for any day on which exceeding five miles from head-quarters, exceeding five miles. But an officer travelling from head-quarters is entitled to draw the amount of ferry and other tolls or railway fare

Exceptions—1. No travelling allowance, other than, is admissible to a District or Assistant District Superintendent, otherwise than in the course of a tour, unless he is in this clause "Tour" means a journey which involves more consecutive nights, and the visitation of two or

2. In the Bombay Presidency, general-duty Karkuns and their peons, Talukis deputed on duty outside their

NOTE—[The term "general duty Karkun" applies to any member on the establishment of a Mamlatdar or Mahalkari occasionally deputed to any part of a taluka for any special enquiry or purpose when the duty for any reason cannot be performed by a Circle Inspector.]

Halts during Tour.

1056. A daily allowance may not be drawn for more than ten days of a halt at one place. But general or individual exemptions from the operation of this rule may be sanctioned by the Local Government by a general rule or order, where they are satisfied—

- (a) that prolonged halts are necessary in the interests of the public service, and
- (b) that such halts necessitate the maintenance of camp equipage or, where no camp equipage is maintained, entail extra expense on the officer after the first ten days.

- (iii) An officer of the third class, two annas for every Rs. 12½, or fraction of Rs. 12½ of the pay or maximum pay of his appointment, subject to a minimum of six annas in the Bombay Presidency, or four annas elsewhere.
- (iv) An officer of the fourth class, three annas if he travels over more than one province, and two annas if he travels over a single province.

Exceptions—(a) The officers mentioned in Appendix 25 are entitled to daily allowance as shown therein.

the Inspector General to Rs. 3

(bb) The camp clerk of the Inspector General of Irrigation draws a daily allowance of Rs. 2 which may, in special cases, be increased by the Inspector General to Rs. 3. The peons who accompany the litter on tour draw a daily allowance of four annas.

(c) The Vice-Consul at Jeddah and the Vice-Consul for Hodeida and Kamaran, when travelling in their Vice-Consular capacity in the public service in the Hedjaz, Red Sea, etc., are reimbursed their actual travelling expenses and receive in addition £1 per diem for subsistence.

- (i) Clerks on salaries of less than Rs. 100—Full salary, provided the sum of salary and allowance does not exceed Rs. 150 a month.
- (ii) Clerks on salaries of not less than Rs. 100, but less than Rs. 200—Half salary provided the sum of salary and allowance does not exceed Rs. 266½ a month.
- (iii) Clerks on salaries of Rs. 200 and above—One-third salary to a maximum of Rs. 200 a month.

NOTE—[The Sub-Assistant Surgeon and Compounders attached to the Viceroy's dispensary and the Postmaster and Postmen of the Viceroy's Camp Post Office, when accompanying His Excellency on tour, are treated for the purposes of this rule as clerks.]

(e) Permanent clerks and permanent and temporary shroffs and pottars deputed to accompany remittances to the places named below, are entitled to daily allowances at the following rates for the period of their absence on duty:—

	Clerks.	Pottars and Shroffs.
	Rs. A. P.	Rs. A. P.
(i) Bombay, Calcutta, Karachi and Rangoon	1 4 0	1 0 0
(ii) Other places beyond their provinces	0 12 0	0 8 0

The Controller of Currency may however grant Rs. 1-8-0 to clerks, Rs. 1-4-0 to pottars or shroffs and annas 4 to peons when he is satisfied that the rates otherwise admissible are insufficient.

(f) Clerks and Sub-Postmasters of the camp post offices and Hospital Assistants accompanying the Lieutenant-Governor of the Punjab on tour are granted an allowance of one-third salary, subject to a maximum of Rs. 50 and a minimum of Rs. 20 a month from the date on which the camp leaves head-quarters to the date of its return. Inferior servants are entitled to the same rates as those of the camp post offices. The Secretary to the Government of Bengal and the Secretariat clerk attending upon the Governor of Bengal are accompanied by the Governor of Bengal.

(g) Settlement and Assistant Settlement Officers in Bengal, Bihar and Orissa and Assam; Excise Deputy Collectors in Bihar and Orissa; Assistant Directors of Survey and officers of the Provincial Service of the Survey of India employed in Bengal, Bihar and Orissa and

Assam; and Deputy Collectors and Sub-Deputy Collectors employed on survey work in Bengal, Bihar and Orissa and Assam, are entitled to daily allowance at the following rates:—

- (i) Officers on pay of Rs. 700 or upwards, Rs. 7-8-0 a day.
- (ii) Officers on pay of less than Rs. 700 a month, 50 per cent. in excess of the rate of their class, subject to a maximum of Rs. 5 a day. For journeys by boat in the Chittagong and Dacca divisions, and the districts of Khulna, Jessore and the 24-Parganas, the officers may draw only such daily allowance as is shown in the Local Manuals of the Audit officers concerned (see Art. 1140).

(A) Cash aircars and potdars on the Eastern Bengal State Railway, when temporarily employed in the capacity of Assistant Pay Clerks, and travelling with cash on the line, draw travelling allowance at the same rate as Assistant Pay Clerks.

- (i) The persons who accompany the Comptroller and Auditor General, the Educational Com-

1064. With the following exceptions an officer of the Public Works Department holding an appointment in a Secretariat, or any other special appointment draws the daily allowance of his class in the Department:—

(1) The Secretary to the Government of India in the Public Works Department is entitled to a daily allowance of Rs. 10.

(2) Secretaries or Joint Secretaries to Government in the Public Works Department of Madras, Bombay, Bengal, the United Provinces, Punjab, Burma and Bihar and Orissa, when travelling with the Governor or Lieutenant-Governor, are entitled to a daily allowance of Rs. 10.

SECTION V.—MILEAGE IN LIEU OF DAILY ALLOWANCES.

When Daily Allowances are exchangeable.

1065. An officer may for any day draw in lieu of his daily allowance—

- (i) if he travels by railway or steamer or both, the allowances admissible under Articles 1011 to 1015 or Articles 1016 to 1032, or both, as the case may be;
- (ii) if he travels more than twenty miles by road, or if, being a non-gazetted ministerial or a menial officer, he travels by public or hired conveyance under a certificate from the head of the office that he was required to do so, the allowances admissible under Chapter LII;

NOTE.—[On the question of the advisability of laying down a scale or limit of actual expenses within the general limits of the rates for each class, the Government of India passed the following orders —

"After a full consideration of all the reports received, the Governor General in Council has arrived at the conclusion that it is impossible to lay down any general subsidiary scale

of rates for the different classes of travel, but that it is possible to lay down certain restrictions or limits which may, if considered advisable, amount to an absolute prohibition of the exchange of daily allowance for mileage in certain cases,..... or they may consist only in the prescribing of a subsidiary scale"

fit to prescribe. Such restrictions or limits may, if considered advisable, amount to an absolute prohibition of the exchange of daily allowance for mileage in certain cases,..... or they may consist only in the prescribing of a subsidiary scale"

(iii) if he travels partly by road and partly by rail or steamer, or both—

- (1) in respect of the road journey, the allowance admissible under Articles 1033 to 1037, limited unless the conditions of clause (ii) of this Article are fulfilled, to the amount of the daily allowance ;

NOTE.—[In determining the allowance admissible under clause (iii) (1) for a road journey other than a journey to and from an officer's head-quarters the distance actually travelled on duty shall be taken into account, without reference to the situation of any public office or other point fixed by a Local Government under Article 998, provided that the road and rail journeys are made on the same day and in continuation of each other]

- (2) in respect of the journey by railway or steamer, the allowances admissible under Article 999, or Articles 1011 to 1015, or Articles 1016 to 1032, or both, as the case may be.

1066. In the case of officers whose salary does not exceed Rs. 200 a month the Local Government may, by general or special order, and subject to such conditions as it thinks fit to impose, permit any officer or class of officers to draw allowances admissible under Chapter LII for the whole period of any absence from head-quarters on condition that no daily allowance is drawn for such period, if it considers that their duty is such that the daily allowance is not sufficient to cover travelling expenses.

Officers attached to Railways.

1067. The following officers, whose duties require them to travel constantly by railway, are not entitled to allowances under Articles 1011 to 1015, except in cases of transfer from one line to another, but are granted daily allowances for any day on which they are absent from their station for more than eight consecutive hours, in addition to a free pass, or if they are not allowed a free pass, the fares for themselves and for the servants and baggage accompanying them which a free pass would cover :—

All officers and men of Railway Police.

All officers attached to Open Lines of State Railways except the Train

Government Telegraph Officers employed on the maintenance of tele-

graph lines along railways.

Medical subordinates attached to Open Lines of Guaranteed or State Railways.

Other officers to whom the concession may from time to time be extended.

1. Inspectors of maintenance on State Railways are not entitled to draw allowances under this Article, except when they are, under special circumstances, absent from head-quarters (.....) head (.....) this (.....) struc- (.....) lines]

this Article,
a road or steamer journey
place distant five miles or
allowances under Articles

must be neglected by the
officer in calculating the duration of absence from his station for the purpose of claiming daily allowance under this Article]

Postal (Mail) Officers.

1068. Superintendents and Assistant Superintendents, Railway Mail Service, Inspectors General, Railway Mail Service and Sorting, and Inspectors of Sorting are entitled, for journeys by railway within the limits of the railways to which they are attached, to free conveyance, and to their daily allowance for any day on which they are absent from head-quarters for not less than six consecutive hours. The same rule applies to journeys by postal conveyance performed by the Superintendent of Mails, Kalka-Simla line, within the limits of that line. Inspectors of Sorting are also entitled to draw a single fare of the lowest class for a servant, if actually paid.

Superintendents and Assistant Superintendents who are employed in the Foreign Mail Division, or who are not attached to any railways or lines, or who are on deputation beyond the limits of the railways and lines to which they are attached, are entitled to special daily allowances at Rs. 0 and Rs. 4, respectively, for a day of not less than six consecutive hours.

NOTE.—[In case of transfer, the officers mentioned in this Article are entitled to travelling allowance under Article 1013.]

1069. Superintendents and Assistant Superintendents, Railway Mail Service, Inspectors General, Railway Mail Service and Sorting, and Inspectors of Sorting may also draw daily allowance, if they are absent from head-quarters for a continuous period of six hours, forming part of one day and part of the next: Provided that if further daily allowance on account of any other journeys is earned under the preceding Article on both the days, it shall be drawn for only one of the two days.

Officers in the Survey of India Department.

1070. (a) The following special rules apply to officers in the Survey of India :—

- (i) A Survey officer may, for a journey in the field, exchange his daily allowance for the allowance admissible under Chapter LII only when he is specially authorized by the Surveyor General or Administrative Superintendents, and when he has to travel by public or hired conveyance or is employed on special duty.
- (ii) Whenever for a journey to or from the field or any other journey in which an officer has to travel with camp equipment, the actual travelling expenses of a Survey officer, including charge by public or hired conveyance, the cost of carriage to and from such conveyance, for himself, his servants and baggage, not exceeding the limit named in the table below, exceed the amount admissible under Chapter LII, he may for such journey, in lieu of the amount so admissible, draw such actual expenses on a bill prepared in sufficient detail and countersigned by the Surveyor General or Administrative Superintendents :—

	When obliged to travel with camp equipment	Otherwise
<i>Servants.</i>	No	No
For an officer of the Imperial Service of not lower rank than an officer in charge of a party or for an Extra Deputy Superintendent	4	3
For an officer of the Lower Subordinate Service or for a Sub-Assistant Surgeon	4	2
Rs. 250	3	1
For any other officer (including probationers) of the Upper Subordinate Service	2	1
For an officer of the Lower Subordinate Service or for a Sub-Assistant Surgeon	1	1
	Mds	Mds.
	35	12
	25	8
carrying a pay of Rs. 200	15	■
For any other officer (including probationers) of the Upper Subordinate Service	10	3
For an officer of the Lower Subordinate Service (including writers) on Rs. 50 pay and over or for a Sub-Assistant Surgeon on Rs. 50 or over	8	2
For any other officer of the Lower Subordinate Service (including writers) or for a Sub-Assistant Surgeon drawing less than Rs. 50	5	2

NOTE.—[In applying this rule a journey must be treated as a whole. An officer cannot draw actual expenses under this rule for a part of a journey and ordinary rates for the remainder.]

- (ii) When the actual expenses for a whole month for carriage in the field of camp equipment and baggage, limited as in the preceding clause, exceed half the daily allowance admissible for that month, the Survey officer may appropriate half his daily allowance to pay for camp equipment and extra servants, and in lieu of the other half of the daily allowance may recover such actual expenses by bills prepared and countersigned as in the preceding clause. When coolies are employed, camp equipment and baggage must be limited to half these weights.

Officers in the Madras Survey.

(b) The above rules apply also to officers in the Madras Survey (including those doing duty as Land Records Superintendent), with the two following modifications, namely, the Director of Survey and the Director of Land Records exercise the functions of the Surveyor General or Administrative Superintendents, and the following table is substituted for the table in clause (a) :—

	When obliged to travel with camp equipment.	Otherwise.
<i>Servants</i>	No	No.
For an Assistant Director of the 1st, 2nd, 3rd or 4th class, and for an Assistant Director of the 5th class when in charge of a survey party	6	3
For an Assistant Director of the 5th class when not in charge of a survey party	4	2
For a Sub-Assistant	3	1
<i>Camp Equipment and Baggage</i>	Mds.	Mds.
For an Assistant Director of the 1st, 2nd, 3rd or 4th class and for an Assistant Director of the 5th class when in charge of a survey party	35	12
For an Assistant Director of the 5th class when not in charge of a survey party	25	8
For a Sub-Assistant	15	5
For Head Surveyors, Deputy Surveyors, Writers—		
(a) whose salaries are not less than Rs. 50	8	2
(b) whose salaries are less than Rs. 50	5	

1071. Clause (a) (ii) of Article 1070 applies to officers of the Geological Survey, the bill in their case being countersigned by the Director.

Other Special Cases.

1072. (a) An Inspector of Post Offices may not exchange his daily allowance for mileage on journeys by road. When travelling by rail or sea, or in a river steamer, he draws the single fare of his class and a single fare (when actually paid) of the lowest class for one servant in addition to his daily allowance. Daily allowance is, however, not admissible when the officer is granted table-money or avails himself of board provided on the steamer.

(b) An Income-tax Assessor in the interior of Bengal and in Bihar and Orissa and Assam is not entitled to exchange his daily allowance for mileage.

Inferior Servants.

1073. An inferior servant if entitled to daily allowance under Article 1038, may, for a journey by railway, draw his daily allowance in addition to railway fare. An inferior servant named in Appendix 20 may draw daily allowance in addition to the rail or steamer fare admissible under Article 1039 for an authorised journey beyond jurisdiction, but not for one within jurisdiction.

NOTE 1.—[The daily allowance admissible under this Article is not to be drawn when
exceed 20 miles]

SECTION VI.—CONVEYANCE ALLOWANCES.

1074. When an officer has a large amount of travelling at or within a short distance from head-quarters, for which travelling allowance is inadmissible under this Chapter, a permanent conveyance or horse allowance is granted to him, which is drawn throughout the year.

1075. Conveyance allowances are granted to the officers named in Appendix 26.

Additions to this Appendix can be made only with the sanction of the Government of India.* A Local Government may however grant a special daily conveyance allowance to an Assistant or Sub-Assistant Surgeon for the periods during which, on account of epidemics, he has an unusual amount of travelling to do.

How affected when on Tour or on Leave.

1076. (a) Save as provided in Article 1077 (b), a permanent conveyance allowance is not forfeited during absence from head-quarters, and may be drawn in addition to any other travelling allowance admissible under rule.

(b) It is, however, inadmissible, except in the undermentioned cases, during joining time and leave.

consider necessary to impose

Exception 3.—Inspectors and Sub-Inspectors of Excise in the Bombay Presidency and Inspectors of the combined Salt, Excise and Opium Department in Sind may draw conveyance allowance during joining time on condition that no extra expense is thereby caused to the State.

* The rule in this Article is to be read as superseded or revised by the Regulations defining the powers of the Government of India and Local Governments in this matter. No amendment has, however, been made in this reprint pending a general revision of the Code.

Public Works, Railway, Telegraph, Forest and other Departments.

1077. (a) A conveyance allowance not exceeding the amount shown in each case in the following table may be granted to a subordinate named in the first column by the authority specified in the third column if such subordinate is travelling at or near head-quarters.

never daily allowance or road mile-

... applied to such
these

Subordinate to whom conveyance or horse allowance may be granted.	Amount of allowance.	Authority for allowance.
<i>Public Works Department.</i>		
* Upper Subordinate	Rs 30	Manager and Engineer-in-Chief, State Railways
† Stationary Inspectors on the North-	30	
India Railway System	30	
Subordinate Inspectors on the Punjab	15	
Secretary of Irrigation Circle, Burma (on condition that a horse is maintained)	15	
† Lower Subordinate	15	Superintending Engineer of Irrigation, Buildings and Roads, or Military Works Branch.
Assistant Surgeon or Civil Apothecary	15	
Sub-Assistant Surgeon	7½	
Ditto (in exceptional cases)	15	
Apprentice Overseer	15	
Cashier	15	Local Government
<i>Military Works Department.</i>		
‡ Storekeepers	7½	Principal, Thomson College.
<i>Telegraph Department.</i>		
Upper Subordinates and Inspecting Telegraph Masters and Signallers other than those sent out on casual inspection duty.	30	Local Government.
Sub-Inspectors at Hindubagh, Loralai, Fort Sandeman, Dera Ismail Khan and Edwardesabad.	Not exceeding Rs. 22-8	Director General of Military Works.
<i>Forest Department</i>		
Sub-Assistant Surgeon	7½	Director-General of Telegraphs and in the case of the Indo-European Telegraph Department, the Director-in-Chief of that Department.
<i>Revenue Department</i>		
Lower Subordinates on the establishment of the Executive Engineer, Tarai and Bhabar Government Estates, United Provinces.	15	Director-General of Telegraphs.

1078. (a) Managers of State Railways may grant a conveyance or horse allowance to subordinate employes on open lines of railway, in cases where the use of a trolley is, in their opinion, a source of danger or of inconvenience, whether with reference to the physical features of the line or to the passage of public trains.

(b) The allowance, which is not to exceed Rs. 30 a month for an officer who ranks with an Upper Subordinate, and Rs. 15 a month for an officer who ranks with a Lower Subordinate, should be given on the understanding that an employe who draws it is on no account to be allowed the use of a trolley on the length in question, and cannot draw ordinary travelling allowance while in receipt of this allowance.

1. Sub-Inspectors of maintenance of the Bolan Railway, who are prohibited from using trollies, may be given allowances not exceeding Rs. 30 a month under this Article.

1079. Subject to the restriction contained in the note under entry 26 in Appendix 25, a horse allowance of Rs. 20 a month may be granted by the Local Government to any Income-tax Assessor employed in the mufassal of Bengal, or in Bihar and Orissa, or in Assam.

SECTION VII.—CONVEYANCE HIRE.

1080. *Cancelled.*

† Lower Subordinates in the Bombay Public Works Department, or Military Works Services

Rs. 22 8 a month

Lower Subordinates in the Lu-hai Hills and in Burma generally receive a horse allowance of Rs. 22-8 a month, for those in the Chun Hills and in Tibet the rate is Rs. 30 a month

Lower Subordinates of the Military Works Services serving in the Loralai District and at Daltandin and Kacha in the Chagai District beyond Nushki draw a horse allowance of Rs. 22 8 a month

allowance of Rs. 30 a month

The senior and the second Military Assistant Surgeon at Lahore (Nowshera), the Military Assistant Surgeon in charge of the Carriage and Wagon Department employes at Mughalpur, and the Military Assistant Surgeon in charge of the Railway hospital at Shaharanpur North Western Railway, draw a horse allowance of Rs. 25 a month

‡ The Storekeeper at Aden draws Rs. 17 8 a month.

1081. The Local Government may grant to any officer summoned temporarily on duty to ■ Presidency town or to Rangoon such conveyance allowance not exceeding Rs. ■ a day as it thinks fit, provided that an officer may not draw conveyance allowance under this rule if or while he is entitled to a daily travelling allowance.

1082. Conveyance hire is granted in the special cases shown in Appendix 27 at the rates and under the conditions therein indicated.

Chapter LIV.—Other Journeys.

SECTION I.—JOINING FIRST APPOINTMENT.

1083. Travelling allowance is not ordinarily granted to any person for the journey to join a first appointment in the public service, but in the case of non-gazetted subordinates, whether permanent or temporary, the Local Government may, either by a special order in each individual case, or by a general order in respect of any particular class of officers, allow travelling allowance, the rate admissible being that of the class (Article 1002) to which the appointment the officer proceeds to join belongs. The Local Government may delegate its powers of sanction in individual cases to any subordinate authority.

Exceptions.—In the following cases travelling allowances are admissible for joining a first appointment :—

Schools of Art and other Government schools who are appointed as draftsmen in the Survey of India Department,

Pensioner re-employed.

1084. The authority competent to sanction the re-appointment may grant travelling allowance to a pensioner or an officer thrown out of employment by reduction of establishment or abolition of appointment, for such part of the journey to take up a new office on re-appointment to the public service, as falls within India.

Journeys by Sea.

1085. The Local Government may grant a free passage for so much of a journey to join an appointment as ■ performed by sea to any person who is

appointed by it or by the Government of India to an office which he cannot join except by sea.

NOTE—[A Local Government may delegate its power under this Article to subordinate authorities in respect of officers appointed by them.]

1086. The Government of Bombay, the Director General of Military Works, and the Superintendent of Port Blair, may grant a free passage for the family of any person engaged in India, for service as a subordinate at Aden and Port Blair, respectively.

Officers appointed in Europe.

1087. The rules regarding (a) passage to India and outfit allowances (in case of appointment in Europe) and (b) return to Europe (on termination of appointment), of certain high officers, which have been framed by the Secretary of State, are given in Appendix 23.

NOTE—[The rule regarding a Chief Justice or Judge of any of the High Courts is included in Statutory Rule No. 40 in Article 543.]

1088. Officers appointed in Europe to the public service in India are ordinarily allowed by the Secretary of State a free passage to India.

1089. *Cancelled.*

1090. A Chaplain who, during his period of probation, is declared by a Medical Board to be permanently incapacitated for further service in India is entitled on retirement to a free passage to his country, provided that he has not before retirement taken leave on medical certificate. A probationer removed from the service for misconduct of any kind, or who

in cases not involving misconduct when satisfied that the circumstances justify this concession.

1091. An officer appointed to the Bengal Pilot Service is granted an Outfit Allowance of £20.

Journeys from Port.

1092. An officer who is appointed by the Secretary of State, while resident in Europe, and who is not one of the high officers referred to in Article 1087, is entitled to travelling allowance at the rates laid down in Chapter LII from the capital town of the Presidency to which he is attached, to the first station to which he is posted.

1093. (a) If such an officer disembarks in India at any port other than the capital town of the Presidency to which he is attached, he is entitled to travelling allowance from such port to the first station to which he is posted, limited to the amount to which he would have been entitled under the preceding Article if he had disembarked at such capital town.

(b) But if an officer is directed by the Secretary of State to proceed to a particular port, he is entitled to travelling allowance from that port.

NOTE.—[For the purposes of the preceding Articles, an officer attached to any Province other than Bombay or Madras, is held to be attached to the Bengal Presidency.]

SECTION II.—JOURNEYS ON TRANSFER.

1094. An officer is entitled to travelling allowance at the rates prescribed in Chapter LII for a journey on transfer from one station to another, if he is transferred for the public convenience, and not at his own request, or in consequence of misconduct, and if he is entitled to pay or salary during the time occupied in such journey. He is also entitled to the following concessions :—

- (a) Free transport on transfer of personal effects by goods train, steamer or other craft up to a maximum of 40, 20 and 10 maunds, respectively, for the first, second and third class officers as defined in Article 1093 and the free transport of tents in Madras or wherever tents are used, but not exceeding 100 lbs. per tent, and the number of tents so carried being subject to a scale to be prescribed by the Local Government as suitable to officers of a particular class.

NOTE.—[For the purposes of this Article, the free transport of personal effects for a first class officer shall be limited to 40 maunds, for a second class officer to 20 maunds, and for a third class officer to 10 maunds.]

- (b) Free transport by train, steamer or other craft of one horse for a third or second class officer and two horses for a first class officer, including, whether separately charged for or not, the cost of conveyance of one syce and one grass-cutter for each horse, when—

- (i) The distance travelled exceeds 80 miles; and
- (ii) The officer's duties involve touring or similar work necessitating his keeping his own horses.

- (c) Free transport of a motor car, instead of two horses, for a first class officer, including whether separately charged for or not the cost of conveyance of a chauffeur or cleaner, subject to the following conditions :—

- (i) That the distance travelled exceeds 80 miles;
- (ii) That the car is actually carried by rail, steamer or other craft;
- (iii) That the rates allowed for the transport of the car are those charged by railway or steamer companies for carrying cars at owner's risk; and
- (iv) That the officer holds an appointment in which the possession of a motor car is advantageous from the point of view of his efficiency.

Inferior servants should not be transferred save in exceptional cases in which there may be special reasons for a transfer.

Exceptions.—1. Police officers below the rank of Assistant Superintendent transferred from one station to another in the same district are not entitled to travelling allowance except for journeys by rail or steamer in which case they are also entitled according to their class to the further concessions described in clauses (a) and (b) above. For journeys by road they may be allowed the actual cost of conveyance of their necessary baggage. In Burma and Assam such officers when so transferred are, however, allowed their actual expenses for journeys by boat on production of a certificate from the District Superintendent that this is the ordinary mode of travelling for persons of their class, and that the amount charged is reasonable.

2. In the United Provinces, Tahsildars and Revenue and Judicial ministerial officers in superior service, transferred from one tahsil to another, or to or from the district head-quarters (sardar) station from or to a tahsil in the same district, are allowed actual expenses not exceeding the allowances admissible under Chapter LII.

NOTE 1.—[Officers of the Forest Department whether belonging to the superior or to the subordinate staff, deputed to attend the annual course of instruction at the Forest School at Dehra Dun or the Burma Vernacular Forest School, members of the subordinate police force in the United Provinces selected for training at the Police Training School, and Hospital Apprentices and medical pupils, attending under orders a medical school or college, are considered to be transferred for the public convenience from one station to another, but may not be granted, except in the case of Burman students deputed to the Forest School at Pymmana, travelling allowance for their families under Article 1093].

NOTE 2.—[Sub-Registers in Sind, who are remunerated entirely by fees, are entitled to travelling allowance when, on public grounds, they are transferred from one station to another.]

NOTE 3.—[An officer eligible to draw travelling allowance under Article 1093 has the option of electing either that or this Article, whichever may happen to be to his advantage.]

1095. The officers mentioned in Article 1067 draw allowances under that Article for journeys on transfers between stations within the limits of the line to which they are attached. They are not, however, entitled to daily allowance for halts made in the course of the journey, unless such halts are made in connection with their duty.

1096. The rules in Articles 1070 (a) (ii) and 1070 (b) for Survey officers apply also to journeys on transfer.

NOTE.—[Survey officers may, at their option, exchange the allowances admissible under this Article for those admissible under Article 1094 or 1093.]

Transfer of Subordinates.

1097. (a) An officer of the classes specified below is, in case of transfer, entitled to free passage or refund of passage-money for each member of his family actually travelling with him, at the rates admissible for himself or at half those rates, according as, by the rules of the vessel, full or half passage-money is payable for such member:—

- (i) Departmental Officers and Warrant Officers;
- (ii) Non-Commissioned Military Officers;
- (iii) European Soldiers; and
- (iv) Officers of the second or third class whose pay is less than Rs. 200.

(b) If, however, any member of the family of such an officer is prevented by good and sufficient cause from travelling with him, the officer who

or such member :
if the date of his

1098. A non-gazetted officer, whose salary after transfer does not exceed Rs. 400 a month, is, if the transfer is to a station more than 200 miles distant by the ordinary route, entitled to travelling allowances as follows :—

(A) For a journey by steamer or railway :—

(i) The amount actually paid in fares for the officer himself, his family and servants, subject to the following limits :—

(a) For himself and family—four full fares of the class of accommodation to which he is ordinarily entitled.

(b) For servants—three full fares of the lowest class.

(ii) For the carriage of personal effects by railway, allowances on the following scale :—

Salary of officer.	Allowance.
Rupces 100 or less	1½ times a third class fare.
More than Rs. 100	One second class fare.

(iii) The actual cost of carriage of personal effects by cargo steamer within the limits of the following scale :—

Salary of officer.	Weight of luggage.
Rupces 100 or less	5 Maunds.
More than Rs. 100 but not more than Rs. 200	8 "
More than Rs. 200	12 "

(iv) When the officer's duties involve touring or similar work necessitating his keeping his own horse, the free transport of one horse.

(B) For a journey by road, four times the rate of mileage to which he is ordinarily entitled, no separate charge being allowed for the cost of carriage of personal effects.

(C) If any member of the officer's family does not travel with him, his or her journey may be charged for within these limits ; provided that he or she follows the officer within six months of the date of his transfer or precedes him by a period not exceeding one month.

NOTE 1.—[In the case of transfer from one place to another which involves travelling in the hills, the Local Government may, at its discretion, relax the limit of 200 miles imposed by this Article.]

NOTE 2.—[The head of the office to which the subordinate is transferred should satisfy himself that the persons for whom travelling allowance is claimed under clause (a) (i) are members of the subordinate's family within the meaning of that term as defined in Article 23.]

1. Civil Sub-Engineers of the Public Works Department, though admitted to gazetted rank, are entitled to draw travelling allowance under the provisions of this Article.

2. This Article does not apply to officers in inferior service who are entitled to travelling allowances for such journeys under ordinary rules.

1098A. Jail warders and head warders who are not in superior service when transferred from one jail to another, inferior servants permanently employed in the survey and settlement parties in the Madras Presidency when transferred from one district to another, Peons (Rs. 10-12) of the combined

Excise and Salt Department, Bengal, Patwaris in the Central Provinces when transferred on promotion to or reversion from the post of Revenue Inspectors from one district to another, and police constables when transferred from one district to another, are entitled to travelling allowance as follows, if they travel with their families :—

- | | | |
|---------------------------|-----------|---|
| (1) By railway or steamer | | Double fare of the lowest class |
| (2) By road or boat | | Two annas a mile by road and one anna a mile by boat. |

Transfer not on Public Grounds, and for Misconduct.

1099. (a) When an officer is transferred otherwise than for the public convenience, a copy of the order of transfer shall be sent to the Audit Officer of the circle of audit in which he is serving, with an endorsement stating the reason of the transfer. In the absence of such an endorsement the Audit Officer shall assume that the officer has been transferred for the public convenience.

(b) In the case of non-gazetted officer, a certificate from the head of the office may be accepted in lieu of the copy of the order prescribed by clause (a).

1100. The authority competent to order the transfer may, if it thinks fit, by special order, permit an officer transferred for misconduct to draw travelling allowance.

Transfers from the Army.

1101. A military officer joining an appointment in the Civil Department may draw travelling allowance subject to the conditions laid down in this Section.

1102. A Non-Commissioned officer of the Native Army, who elects at request for service in the Forest Department, under the rules in force in that department, is entitled to travelling allowance to join his appointment for the journey from his station to the head-quarters of the Forest division to which he is posted, even though the conditions laid down in this Section are not fulfilled.

Appointment changed in Transit.

1103. An officer whose appointment is changed while he is in transit from one appointment to another, is entitled to travelling allowance from his old station to the place (on the route to the station to which he was proceeding) at which he receives his further orders, and thence to his new station.

When leave intervenes.

1104. An officer is entitled to travelling allowance under this Section if, after giving over charge of his office, he takes privilege or examination leave before joining his new office.

1105. An officer transferred during privilege or examination leave is entitled to travelling allowance from his old station, or from the place where he receives the order of transfer, whichever is less.

NOTE.—[An officer who receives the order of transfer at the new station to which he is transferred is entitled to any of the concessions embodied in clauses (a), (b) and (c) of Art. 110.]

1091 on production of a certificate that the expense of removing his personal effects from his old station was incurred subsequent to the intimation of transfer]

station.

1107—1109. *Cancelled.*

SECTION III.—JOURNEYS TO HILL STATIONS.

1110 Special rules—not incorporated in these Regulations—are prescribed for officers and establishments moving with the head-quarters of a Government to and from a hill sanitarium.

1111. *Cancelled.*

1112. When an officer is permitted for his own convenience to conduct his duties at a hill station, neither he, nor any of the establishment which accompanies him, is entitled to travelling allowance for the journey to or from such station.

1113. *Cancelled*

Other officers.

1114 Officers other than those mentioned in the Hill Allowance Rules (see Article 1110), who require to go to a hill station on duty, are, under the ordinary rules, entitled to travelling allowance for the journey there and back and to daily allowances for the period of halt there on duty. But Local Governments and heads of departments have power to refuse, and should refuse, travelling allowance to an officer who visits a hill station on duty if he prolongs his visit beyond the period required for the performance of the duty.

this Article.]

1115. An Audit Officer should retrench the travelling allowance, for a journey to and from a hill station, of an officer who remains at the hill station for more than ten days, unless the head of the department or, where the officer is himself the head of a department, the Local Government officially intimates that the presence of the officer was required on duty throughout the period, or that he was permitted to extend his stay during authorised holidays immediately following his period of duty, the duration of which should be stated

SECTION IV.—JOURNEYS TO ATTEND EXAMINATIONS.

1116. An officer is entitled to travelling allowance twice, but not more than twice, for each standard, for journeys to and fro, consequent on attendance at—

(1) an obligatory departmental examination,

- (2) in the case of Military officers in civil employ, an examination for promotion in military rank,
- (3) an examination held under any rules in force for a reward for passing in the vernacular language of any frontier or hill tribe,
- (4) in the case of officers in Burma, an elementary examination in Chinese, or
- (5) in the case of Civil Assistant Surgeons or Sub-Assistant Surgeons, an examination for promotion to a higher grade

NOTE.—[The Local Government may extend the provisions of this Article to any departmental examination, even though it be not obligatory.]

1117. If a candidate appears to have culpably neglected the duty of preparing himself for an obligatory departmental examination during the period available for the purpose, the Head of a Department may disallow the travelling allowance to which he would otherwise have been entitled under Article 1116.

1118. The Local Government may disallow travelling allowance to a candidate who fails to obtain a reward for passing in the language of a frontier or hill tribe, if such candidate does not attain to such reasonable standard as the Local Government prescribes.

1119. A civil officer or a military officer in civil employ who obtains a reward for proficiency in an Oriental language, or who for the first time obtains a Degree of Honour in any language in the Second Division, is entitled to travelling allowance to and from the place of examination

1120. *Cancelled.*

SECTION V.—JOURNEYS OCCASIONED BY LEAVE OR RETIREMENT.

1121. Save as provided in this Section, or by special order of the Government of India, an officer is not entitled to travelling allowance for a journey on proceeding on, rejoining from, or during leave of any kind; or on retirement or dismissal from the public service.

1121A. (i) Except as provided for in clauses (ii) and (iii), the grant of a free passage to or from England, in cases not provided for under the ordinary rules, requires the sanction of the Secretary of State.

(ii) The Government of India may grant passages, including, if necessary, travelling expenses by rail to the port of embarkation, in urgent cases where in their opinion it is very desirable that an officer, or the dependents of an officer, should leave India, and where the pecuniary circumstances of the individuals concerned are such that they are unable to leave without such assistance.

(iii) The Government of India may also sanction where they think the circumstances specially warrant it, a return passage for any officer entitled to a return passage on the termination of his agreement, whose services are retained in the public interest beyond the original period of his engagement; the Government of India may also sanction an extension of an original concession in regard to free passages home for an officer's family.

Leave on Medical Certificate.

1122. A Military officer in civil employ is entitled to the same privilege when combined with civil employ; but not when in military employ, when proceeding on or returning from leave to use the certificate in (Military) Form E, giving the right to travel in the next higher class of carriage to that for which he purchases a ticket. This can only be used by officers in military employ

1123. A Military Sub-Assistant Surgeon employed in the civil department is entitled, when proceeding on sick leave, leave on private affairs, furlough, or combined leave, for not less than six months, to the same advantages in respect to travelling allowance as if he were serving with a regiment but this Article does not entitle a Military S when proceeding on or returning from Form E referred to in Article 1122.

1124. The provisions of the Military Transport Regulations applicable to Departmental Officers and Warrant Officers proceeding on or returning from leave on medical certificate, not combined with privilege leave apply also to such officers in civil employ.

1125. A Civil Sub-Assistant Surgeon from another province serving in Burma is entitled to a free passage for himself and his family to his home, when proceeding on leave on medical certificate.

1126. Non-Commissioned officers and men of the Military Police companies at Dacca, Bhagalpur, Ranchi, and Hooghly, taking furlough, leave on private affairs or leave on medical certificate, are entitled to free passage by river and rail to and from their homes.

Recall from leave.

1127. An officer recalled to duty before the expiry of leave, is entitled, if the return to duty is compulsory (*see Article 199*) and if the leave is curtailed by one month or more, to travelling allowance for the journey from the place at which the order of recall reaches him, or, if such place be out of India, to free passage to India, and travelling allowance from the port of debarkation, to the station to which he is recalled. If the amount of the leave curtailed is less than one month, the foregoing privileges may be given or withheld at the discretion of the authority recalling the officer, or of the Secretary of State, according as the leave is in or out of India.

1. The officer in charge of a Survey Party may grant at his discretion travelling allowance to Native Surveyors and Subordinates who are recalled to duty from departmental leave before the expiry of that leave

9. An officer, who on recall from leave is ordered to report to a duty station, shall be considered to be on duty from the time he reports to the duty station.

allowance should be allowed for journeys to and from the training headquarters either on joining or leaving such headquarters at the beginning or termination of the period of training, or in cases where the training is received at a school, college or other similar institution, on the occasion of holidays and vacations : Also what travelling and halting allowances should be allowed for journeys during the course of training.

NOTE 1.—[The Local Government may delegate its powers under this Article to Heads of Departments]

To attend Darbars.

1138B. — in the under-
ment Government,
to a (the Military
Police when invited
to attend a Darbar or a Levée at a place other than that at which he is
stationed or has his residence :—

(a) For journeys from his station or place of residence to the station at which the Darbar or the Levée is held, and back—single railway and steamer fares actually incurred each way, and actual expenses of road journeys limited to the maximum amount admissible therefor to an officer of the first class.

(b) For halts at the station at which the Darbar or the Levée is held—Rs. 2 a day.

(2) A civil officer in active service who is permitted to attend a Darbar or a Levée away from his headquarters, is entitled to draw travelling and halting allowances as on a journey on tour.

Chapter LV.—Special Rates for Special Localities.

1130. A Local Government may prescribe that the ordinary rates of daily allowance, or mileage, or both, shall be increased either in a definite ratio or in any other suitable manner for any or all persons travelling in any specified district or locality in which travelling is specially expensive, provided that—

(i) No daily allowance shall be increased so as to exceed Rs. 10.

(ii) No mileage shall be increased so as to exceed one rupee.

(iii) The allowances admissible under Articles 1011 to 1015 and under Articles 1067 to 1069 and 1072 (a) for journeys by railway shall not be increased.

- (iv) The Local Government may, if it thinks fit, except any officer or class of officers from a general rate of increase, and direct that either the ordinary rates, or a lower rate of increase, be granted to such officer or class of officers.

NOTE.—[Local Governments exercising territorial jurisdiction may prescribe special rates under this Article for journeys in special localities within their jurisdiction. Officers subor-

1140. In certain localities special rates of daily or mileage allowances or both, have been prescribed either generally or for particular classes of officers. A list of these special rates in the various provinces is given in the Local Manual of the Audit Officer concerned.

Chapter LVI.—Special Rules for High Officers.

NOTE.—[The rules in this Chapter relate to journeys on duty. Rules on the subject of journeys by railway otherwise than on duty are contained in Appendix 30.]

Viceroy, Governors, and Lieutenant-Governors.

1141. The Viceroy and Governor-General controls his own travelling expenses and those of his household, including the members of his personal Staff, with the exception of his Private and Military Secretaries.

1142. Governors, Lieutenant-Governors and the Chief Commissioners, Central Provinces and Assam, control their own travelling expenses and those of their household, with the exception of the officers of their personal Staff. The Military Secretary and Aides-de-Camp to the Governor of Bombay receive their actual travelling expenses while on tour with His Excellency the Governor.

1143. The travelling expenses of the Governors of Madras and Bombay and of their households, are paid out of the contract allowance for household charges.

1144. A Local Government (other than the Governments of Madras and Bombay) should report to the Government of India, in the Finance Department, any representations made with regard to its travelling expenses by the Accountant-General and any measures taken in consequence of such representations.

Indian Members of the Council of India.

1144A. A gentleman who is habitually resident in India at the time of receiving notice of his intended appointment to the Council of India, shall receive £500 as allowance for equipment and £100 for the voyage to England to be paid on appointment, and £100 to be paid on termination of office for the return voyage to India.

Members of Viceroy's Council.

1145. An Ordinary Member of the Viceroy's Council, when travelling on duty by railway, is entitled to a reserved first class carriage for himself, and to third class accommodation for not more than ten personal servants.

When travelling on duty by road or steamer he is entitled to charge to Government his personal *bonâ fide* travelling expenses, appending to his bill a certificate as follows :—

"I certify that I have actually paid the amount of this bill, and that it does not include any charge for the freight of any stores or goods, other than my personal luggage, or any charge for refreshments, hotels or staging bungalows."

NOTE 1.—[Stores taken for consumption on tour are treated as personal luggage]

NOTE 2.—[Further rules are contained in Note 2 to Article 1000 and Appendix 30]

1146. *Cancelled.*

Members of a Governor's Executive Council.

1147. Members of the Executive Councils of Governors and Lieutenant-Governors, when travelling by railway, are entitled to a reserved first class carriage, to railway fares actually paid for not more than ten personal servants at lowest class rates, and to the conveyance of all their personal luggage at the public expense, whether taken in the luggage van of the train to which the reserved carriage is attached or sent by any other train.

When travelling by road or steamer they are entitled to charge to Government their personal *bonâ fide* travelling expenses, appending to their bills a certificate as follows :—

"I certify that I have actually paid the amount of this bill, and that it does not include any charge for the freight of any stores or goods, other than my personal luggage, or any charge for refreshments, hotels, or staging bungalows."

NOTE 1.—[Stores taken for consumption on tour are treated as personal luggage]

NOTE 2.—[Further rules are contained in Note 2 to Article 1000]

Members of the Imperial and Provincial Legislative Councils.

1148. Additional Members of the Imperial Legislative Council and all Additional Members or Members of the Provincial Legislative Councils, who are required to leave their official head-quarters or usual places of residence for the purpose of attending meetings of any such Councils or transacting business connected with their duties as Members of any such Councils, are entitled to travelling allowances in accordance with the following scale :—

- (1) The travelling allowances admissible to an officer of the first class to and from the place at which the Council meets, or the business is to be transacted, and

(2) a daily allowance for each day of residence at the place where the Council is to meet or the business is to be transacted until the close of the session or the completion of the business, at the rate—

(a) in the case of Additional Members of the Imperial Legislative Council, of Rs. 20 a day, and

(b) in the case of Additional Members or Members of the Provincial Legislative Councils, of Rs. 10 a day.

Provided that—

(i) an Additional Member of the Imperial Legislative Council travelling to and from the place at which the Council meets, or the business is to be transacted, by railway in a first class compartment or by steamer in a cabin reserved by him for his personal use will, for such part of the journey as may be so made, be entitled, in lieu of the allowances admissible under clause (1), to a refund of the cost of reserving such a compartment or cabin,

(ii) any person who is at the same time a Member of the Imperial and of a Provincial Council, and who leaves the place of meeting of the Imperial Council, to attend the Provincial Council, will be entitled to travelling allowances, as in clause (1) and proviso (i), for journeys between the places of meeting of the Imperial and Provincial Councils, and if the place of meeting of the Provincial Council is not the official head-quarters or usual place of residence of the Member, to a daily allowance at Rs 20 a day during the period of such attendance,

(iii) an Official Member, who is in receipt of a fixed monthly travelling allowance, will not be entitled to any allowances under this Article unless he leaves the limits of his jurisdiction to attend the Council or to transact business connected with his duties as a Member of the Council, in which cases he will be entitled to the same travelling and daily allowances as other Members, subject, however, to the condition that such sum as may represent the amount of his fixed monthly allowance calculated at a proportionate daily rate, shall be deducted from his travelling and daily allowances.

Bishops of Calcutta, Madras and Bombay.

1149. The Bishops of Calcutta, Madras and Bombay, when on tours of visitation, draw a monthly allowance of Rs. 1,000 (which is intended to cover all their expenses and those of their clerks and messengers for journeys by land) for the whole period of visitation, in addition to the actual expenses of journeys by sea: Provided that the monthly allowance may not be drawn by any individual Bishop for more than eighteen months in every three years

of his term of office. The allowance which is admissible only when the Bishop is actually engaged in episcopal visitation or is travelling with that object in view, may not be drawn for any period spent in the visitation of a Sanitarium without the express approval of the Local Government.

1150—1157.—*Cancelled (see Appendix 30).*

Fares payable by Officers travelling in a reserved carriage.

1158. The officers mentioned in Articles 1145, 1147, and in Parts II and III of Appendix 30 should pay the usual fares for any person besides themselves travelling in the reserved accommodation provided for them. It is open to the officers to obtain the accommodation they are entitled to by requisition or by purchase of the necessary number of tickets for cash according to their convenience.

NOTE.—(When the reserved accommodation is obtained by the purchase of a prescribed

travelled with me

by requisition in the form prescribed in
or persons travelling with him and get the
certificate to the effect that fares for such

Chapter LVII.—Rules of Procedure.

Countersignature.

1159. A bill for travelling allowance (other than a permanent allowance) of an officer, other than the head of a department, on tour should not be paid unless countersigned by the Controlling officer. The Local Government may declare who shall be the Controlling officer for all or any of the officers of any particular department.

1160. In the following cases bills for travelling allowance may be paid without countersignature :—

(a) Chaplains—provided the bill is accompanied by the order, authorising the Chaplain to make the journey, of (a) the Bishop or Commissary of the Diocese in the case of a Chaplain of the Church of England, and (b) the Presidency Senior Chaplain of the Church of Scotland in the case of a Chaplain of the Church of Scotland.

(b) Deputy Auditors General, the Examiner of Government Press Accounts and the Auditor of Customs House Accounts in India—provided that duplicate bills are at the same time forwarded to the Comptroller and Auditor General for countersignature and transmission to the Comptroller, India Treasuries.

(c) Non-gazetted officers—provided that detailed countersigned bills are subsequently submitted to the Audit Officer for adjustment.

Duties of Controlling and Audit Officers and of Officers who draw travelling Allowance Bills.

1161. (A). It is the duty of the Controlling officer, (or of the Drawing officer when a bill does not require countersignature) to scrutinise the necessity, frequency, and duration of journeys or halts for which travelling allowance (whether permanent or other) is claimed. He may disallow the whole or a portion of the travelling allowance claimable for any journey or halt, if he considers that the journey was unnecessary, or that it was not completed with due expedition, or that the halt was of excessive duration. He should also carefully check the bills entered in travelling allowance bills whether countersigned or not are correct.

(b) The Local Government may lay down any subsidiary rules that it thinks fit, for the guidance of a Controlling officer of any department.

1162. A Controlling officer (other than the Head of a Local Government or Administration, including the Commissioner in Sind) may not delegate the duty of countersignature to a subordinate.

1163. Countersignature does not dispense with the necessity for formal audit with reference to rates and general conditions. An Audit Officer will

that the claim is admissible with reference to Article 1161(a) and to any departmental rules. It is the duty of the Controlling, or the Drawing officer as the case may be, and not of the Audit Officer, to enforce departmental rules.

REFERENCE TABLES.

REFERENCE TABLES.

Note.—Except in the case of the rules mentioned in the first two statements below, the same as in the 5th Edition. The Reference where the rules in that and the 4th Edition

ABBREVIATIONS USED IN THESE TABLES.

N., Not in the 5th Edition. Ex., Exception. r., rule or rules. n., note or notes. O., omitted.

Table I.—Showing the variations in the rules of the 5th Edition (2nd Reprint) as compared with the 5th Edition of the Civil Service Regulations.

REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO	
5th Edn 2nd Re- print.	5th Edn.	5th Edn. 2nd Re- print.	5th Edn.	5th Edn. 2nd Re- print.	5th Edn.	5th Edn. 2nd Re- print.	5th Edn.	5th Edn. 2nd Re- print.	5th Edn.
1 (c)	1 n.	72 (b)	N	83 n. 2	85 n. 1	161 n	N	198 n. 2	N.
16 n. 4	N.	72 (r)	72 (d)	83 n. 3	85 n. 2	167 n	N.	199 n. 1	199 n.
20A (c)	N	72 (d)	72 (b)	83 n. 4	85 n. 3	172 A	N	199 n. 2	N.
30 r. 3	N	72 (e)	72 (b) n	89 r. 2	N.	172 B	N	203 A n. 102	N.
39 r. 4	39 r. 3	72 n. 1	N	89 n	N.	173 n	N	224 n.	N
44 A	N	73 n. 2	72 (d) n	104 (4) f 1 & 2	N	174 n	N	237 (r) n	N
49 n. 1	N	73 n	N	124 (r)	124 (r)	177 n. 1	N	260 r 2	N.
49 n. 2	49 n	74 (r) n. 1	74 (r) n.	142	142 (a) & (b)	177 n. 2	177 n. 1	263 Ex	N
53 r. 2	N	74 (c) n. 2	N	144 n. 1	N	177 n. 3	177 n. 2	264 n. 1	264 n.
53 r. 3	53 r. 2	76 A & 77	77	144 n. 2	144 n. 1	178 n	N	264 n. 2	N
55 n.	N	76 B	76 A	144 n. 3	144 n. 2	180 n.	N.	267 r. 2 n.	N.
57 n.	N.	76 B	76 A	160 A n. 1 & 2	N	183 r. 1	N.	193 n. 1	195 n.
65 n. 1 & 2	N	83 n. 1	N						

REFERENCE TABLES.

Table I.—Showing the variations in the rules of the 5th Edition (2nd Reprint) as compared with the 5th Edition of the Civil Service Regulations—contd.

REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO	
5th Edn 2nd Re- print	5th Edn	5th Edn 2nd Re- print.	5th Edn.	5th Edn 2nd Re- print.	5th Edn	5th Edn, 2nd Re- print	5th Edn.	5th Edn. 2nd Re- print.	5th Edn
278 n 1	278 n	423 (2)	423 (2)	593 (a) n.	N.	612 (b) n 4 & 5	N.	697	693
278 n 2	N	446 n	N.	599 n. 1	599 n	642 (b) n 6	642 (b) n 3	698	699
280 (a), (b), (c) & n	280 (a), (b) & n.	467 n	N	599 n. 2	N	643 n 1 & 2	N	699	697
280 (d), (e) & n.	280 (c), (d) & n.	468 A	N	600 (a)	600	650 n 1	650 n.	700	696
288 n 3	N.	475 n. 1	475 n.	600 (b) & n.	N	650 n. 2	N.	749 A	1 and 2 in pre- amble to new Fore ign Ser- vice rules.
295 (u)	295 (u)	475 n. 2 & 3	N.	635 r. 1	N.	661 n.	N.	749 B	
295 r. 3	N.	514 (n) n 1 to 5	N.	635 n. 1	N	663 n.	N.		
308 n	N	524 A	N.	635 n. 2	635 n.	664 (c) n.	N.	766 n.	N.
338 n.	N.	542 C	N.	642 (a) (i)	N.	666 n.	N	764 (iv) (a) n.	N.
353 n.	N.	543 r. 33 A	N.	642 (a) (u)	642 (a) (i)	671 n. 1	671 n.	783	785
353 A	N.	543 r. 33 B	543 r. 33 A	642 (a) (u)	642 (a) (u)	671 n. 2	N.	783 n. 1	N.
356 Ex. 5 & 6	N.	564 B	N.	642 (a) (iv)	642 (a) (ii)	693	N.	783 n. 2	785 n. 1
368 n.	N.	566 n. to Sec- tion 4 (c) of Leave Regu- la- tions.	N.	642 (b) n. 2	N.	693 A	603 (a) & (b)	783 n. 3	785 n. 2
411 n. 1 & 2	N.			642 (b) n. 3	642 (b) n. 2	695	700	783 n. 4	N.
422 & n.	422 (i) (u) & n.					696	695	811 n.	N.

REFERENCE TABLES.

Table I.—Showing the variations in the rules of the 5th Edition (2nd Reprint) as compared with the 5th Edition of the Civil Service Regulations—concl'd.

REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO	
5th Edn. 2nd Re- print.	5th Edn.	5th Edn. 2nd Re- print.	5th Edn.	5th Edn. 2nd Re- print	5th Edn.	5th Edn. 2nd Re- print.	5th Edn.	5th Edn. 2nd Re- print.	5th Edn.
814 n	N.	999 (2)	999 (u)	1011 n. 1	1011 n.	1094 (a), (a) n., (b), (c) & n. 3		1105 n	N.
863 n	863 n. 2	999 (3)	999 (2)	1011 n. 2	N.		N	1116 (5)	N.
914 A	N.	999 A	999 (1)	1011 Ex. (e)	N.	1096 n	N.	112 A (i)	1121 A
918 n 1 & 2	N	999 A (a), (b), (c) & (d)	999 (1) (h), (a), (j) & (g)					1121 A (u) & (m)	N.
941 (a)	941			1059 n. 1	N.	1098 (A) (i) (a) (b)	1098 (a) (i) & (u)		
941 (b)	N	999 A (e)	N	1059 n. 2	1059 n.			1131 A	N
949 (b)	N.					1098 (A) (u)	N		
949 (c)	949 (b)	1000 n 1	1000 n	1063 Ex. (i) & (j)	N.			1133 n. 1 & 2	N.
957 n	957 n.	1000 n 2	N.	1063 r 1 n. 2	N	1098 (A) (u)	1098 (a) (u)	1133 n. 3 & 4	1133 n. 2 & 3
999	999 & 991								
999 (1)	999	1002 n. 1	N.	1073 n. 1	N.	1098 (A) (iv)	N.	1137 A	N.
999 (1) (a)	999 (v)	1002 n. 2	1002 n. 1	1073 n. 2	1073 n.	1098 (B) & (C)	1098 (b) & (c)	1137 B	1137 A
999 (1) (b)	N.	1002 n. 3	1002 n. 2	1076 Ex. 3	N.			1133 A n. 1, 2 & 3	N
999 (1) n.	999 (1) (j)	1002 n. 4	N.	1085 n.	N.	1098 n. 1 & 2 & r.	N.	1135 B	N.

REFERENCE TABLES.

Table 11.—Showing the variations in the rules of the 5th Edition as compared with the 5th Edition (2nd Reprint) of the Civil Service Regulations.

REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO	
5th Edn.	5th Edn. 2nd Re-print	5th Edn.	5th Edn. 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print
1 n	1 (r)	79 & 80	O.	280 (a) (b) & n.	280 (a), (b), (c) & n.	612 (a) (i)	642 (a) (u)	698	697
30 r 3	30 r 4	85 n 1	85 n 2	280 (c), (d) & n	280 (d), (e) & n	612 (a) (u)	642 (a) (uu)	699	697
49 n	49 n. 2	85 n 2	85 n. 3					700	695
53 r 2	53 r. 3	85 n. 3	85 n. 4	295 (uu)	295 (u)	612 (a) (uu)	612 (a) (iv)	1 & 2 in preamble to new Foreign Service rules } 740 A & 740 B	
70	O.	124 (c) & (d)	O.	422 (i) (u) & n	422 & n.	612 (b) n 2	642 (b) n. 3		
72 (b)	72 (d)	124 (c)	124 (c)	423 (2) (a) & (b)	423 (2)				
72 (b) n.	72 (c)	127 to 132	O			612 (b) n 3	642 (b) n 6	785	783
72 (c)	O.	141 Ex	O	423 A	O.			785 n 1	783 n 2
72 (d)	72 (c)	142 (a) & (b)	142	475 n	475 n 1	613	O		
72 (d) n	72 n. 2	144 n. 1	144 n 2	478 to 490	O	650 n	650 n. 1	785 n. 2	783 n B
74 (r) n	74 (c) n 1	144 n 2	144 n 3	543 r	543 r	671 n	671 n 1	863 n 2	863 n
75 & 76	O.	193 n	193 n 1	33 A	33 B	693 (a) & (b)	693 A	941	941 (a)
77	76 A & 77	193 n.	193 n. 1	592 n.	O.	693 (r)	O.	913 (b)	913 (r)
77 A & 78	O.	264 n. 1	264 n	599 n	599 n 1	695	696	957 n. 1	957 n
78 A	76 B	270	O.	600	600 (a)	696	709	990 & 991	990
		278 n.	278 n. 1	635 n.	635 n. 2	697	699		

REFERENCE TABLES.

Table II.—Showing the variations in the rules of the 5th Edition as compared with the 5th Edition (2nd Reprint) of the Civil Service Regulations—contd.

REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO	
5th Edn.	5th Edn. 2nd Re-print	5th Edn.	5th Edn. 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print	5th Edn.	5th Edn. 2nd Re-print.
999	999 (1)	999 (1) (e)	O	999 (2)	999 (3)	1073 n.	1073 n 2	1121 A	1121 A (v)
999 (i)	999 (1) (a)	999 (1) (f) & (g)	999 A (e) & (d)	1000 n.	1000 n 1	1080	O	1133 proviso & n. 1	O.
999 (u)	999 (2)			1002 n. 1 & 2	1002 n 2 & 3	1097 n.	O.		
999 (l)	999 A	999 (1) (h)	999 A (a)			1098 (a) (A)	1098 (B) & (C)	1133 n. 2 & 3	1133 n 3 & 4
999 (1) (a)	999 A (b)	999 (1) (v)	App No. 16 A	1011 n.	1011 n 1	1099 (b) & (c)	O.	1137 A	1137 B
999 (1) (b), (c) & (d)	App No 10 A	999 (1) (j)	999 (1) n	1034 (b)	O	1099 n.	O.		
				1059 n.	1059 n 2	1120	O	1163 r 1	O

REFERENCE TABLES.

Table III.—Comparing the new with the old Foreign Service rules.

REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO	
New rule	Old rule	New rule	Old rule	New rule.	Old rule.	New rule.	Old rule
749 A	N.	759	774 (a) & (b)	765 (a)	755 (a) 757 (a)	770 n. 3	757 (b) n. 2
749 B	N	759 & n.	782 A & n.	765 (b)	N	770 n. 4	755 (a) (i) n. 4 755 (a) (ii)
750, first & second	750, first & second	760	742 B	766	765 (a) 779 (a)	770 n. 5.	763 (c)
751	753 (v)	761 (a) & (b)	757 A	767	754 (a) 755 (a) (i) & n. 3	770 n. 6	N.
752	754 (b) (i) & n. 754 (b) (ii) & n. 757 second part & n	761 (c) & n. 1 & 2	N.	767 Ex.	754 (a) Ex.	771 n. 1	785 Ex.
752 n.	N.	762 (v)	753 (i)	767 n.	754 (a) n. 2	771 n. 2	785 n. 1
753	755 (b) 779	762 n.	753 A n.	768	754 (b) (i) & (ii) 755 (a) (ii)	771 n. 3	785 n. 2
754	784	763	753 (ii) 761 (b), first part	769	763 780	772 (a) 772 (b) (i)	762 758 (a) & n.
755 (a)	786 } first part 757 } part	763 n	N	770	755 (a) (i) & (ii) 768	772 (b) (ii) 772 (b) (iii)	763 (a) 763 (c) & n
755 (b)	N	763 r. 1	761 (a) n.	770 n. 1	757 (b) n. 1 768 n. 2 779 (a) n. 1	772 (b) (iv) 772 (b) (v)	763 (g) N.
756	753 (iv) (d) 760 774 (c)	763 r. 2 763 r. 3	753 (ii) (a) n. N.	770 n. 2	754 (a) n. 1 768 n. 2	773	753A 771 772
756 n.	N	764	753 (iv)				
757	783	764-IV (a), n.	N.				

REFERENCE TABLES.

Table III.—Comparing the new with the old Foreign Service rules—contd.

REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO	
New rule.	Old rule	New rule.	Old rule.	New rule.	Old rule	New rule.	Old rule.
774 (a)	772 (c)	775 (c)	770 n.	779	779 (a)	782	792
			772 (b) n.		780		
774 (b) (1)	772 (a)	776	775	780 (a)	789	783	795
			776				
774 (b) (2)	772 (b)		782, second part	780 (b) & (c)	790 & n.	781 n. 1	N
775	770	777				783 n. 2	795 n. 2 (b)
775 (b)	777	778	782, first part & n.	781	757 (b) 791	783 n. 3 & 4	N.

REFERENCE TABLES.

Table IV.—Comparing the old with the new Foreign Service rules.

REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO	
Old rule.	New rule.	Old rule	New rule	Old rule	New rule.	Old rule	New rule.
750 first d. second	750 first d. second	764 (a) n 2	767 n	757 (b) n 1 & 2	770 n 1 & 3	763 (g)	772 (b) (iv)
750 third	()	754 (b)	769 & 762	757 (b) n. 3	O.	764	O.
761	O.	755 (a) (i)	770 767	757 A	761 (a) & (b)	765, first part	769 second
762	Cancelled	765 (a) (i)	O.	758 (a) & n	772 (b) (c)	765, second part	O.
763 (i)	762 (i)	765 (a) (i) n 1 & 2		758 (b)	O.	766	766
763 (ii) (a)	763	765 (a) (i) n 3	767	759	O	767	O
763 (ii) (a) n.	763 r 2	755 (a) (i) n 4	770 n 4	760	()	768	769 770
763 (ii) (b)	O.	755 (a) (ii)	770 768	761 (a)	O.	768 n. 1 & 3	O.
763 (iii)	763	755 (a) (ii) n	()	761 (a) n	763 n 1	768 n 2	770 n 1 & 2
763 (iv)	764	755 (b)	763	761 (b), first part	763 (iv)	769	O.
763 (iv) (d)	766	755 (c) first part & note	O.	761 (b), second part & r 1	O.	770	775
763 (v)	761					770 n.	776 (c)
763 A	773, first part	755 (c), second part	762 (ii)	761 (b) n.	763 r 2.	771	773
763 A n.	762 n	756	O.	762	772 (a)	772 (a) & (b)	774 (b) (1) & (2)
764 (a)	767	757 (a)	765 (a) 770	763 (a)	772 (b) (m)	772 (b) n.	775 (c)
764 (a) F.x.	767 Ex.	757 (b)	781	763 (b), (c), (d), (f) & (k)	O	772 (c)	774 (a)
764 (a) n. 1	770 n. 2			763 (c) & n.	772 (b) (m)		

REFERENCE TABLES.

Table IV.—Comparing the old with the new Foreign Service rules—contd.

REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO	
Old rule	New rule.	Old rule.	New rule	Old rule.	New rule.	Old rule.	New rule
772 (c) n.	O.	779 (a) n. 1	770 n. 1	784	754	789	} 780
773	773	779 (a) n. 2 & (b)	O.	785	771	790	
774 (a) & (b)	758	780	{ 769, last part 779	785 Ex.	771 n. 1	790 Ex.	O.
774 (b) n.	O.			785 n. 1	771 n. 2	791	781
774 (c)	756	781	O.	785 n. 2	785 n. 3	792	782
775	776	782, second part	777	786	{ 755 (a)	793	O.
776	776			787, first part		794	()
777	775 (b)	782, first part & n	778	786, second part	O	793	783
778	753	782 A	759	787, second part & n	752	793 n. 1 & 2 (a)	()
779 (a) }	766	782 B	760			795 n. 2 (b)	783 n. 2
	770	783	()	788	757		

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This Index has been compiled solely for the purpose of assisting references. No expression used in it should be considered in any way as interpreting the rules.

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Greenshields, 9 Moo P. C. 18; *Mancharj v. Hongoseco*, 11 B. H. C. R. 59; *Hakeem v. Beejoy*, 22 W. R. 8; *Jugul Karsore v. Kartic*, 21 C. 116; *Bhikk v. Udit*, 25 A. 366; *Kondiba v. Nana*, 34 I. A. 138

whether registration is sufficient
 Court mere registration does not
 W. N. 11, *Monindra v. Troylockho*,
 by Chief Justice Sir Arthur Collins
 Court in *Shan Man Mull v. Madras*
 Bombay and Allahabad High Courts
Chenoasapa, 9 B. 427, *Chintaman v.*
 A. L. 177

has been set at rest by the decision of the P.
Khedampal, 25 C. W. N. 49-48 C. 1 (P. C.)
 cannot in all cases be imputed from the mere fact of registration of a document.
 Whether registration or is not notice in itself depends upon the facts and
 circumstances of each case, upon the degree of care and caution which an
 ordinarily prudent man would necessarily take for the protection of his own
 interest by search into the registers kept under the Registration Act. *Ibid*, but
 now see Act XX of 1929 s. 4

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 collateral may be proved, if they show good faith or prudence or the knowledge
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 instances occur most frequently in cases of assignments for the benefit of
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illustration (r) is based on the case of *Sheen v. Bumpstead*, 2 H. & C. 100-32
 L. J. Ex. 271. In that case which was an action brought against the defendant
 for false representation as to the trustworthiness of W, the plaintiff as part of
 the representation had

the state of mind of the defendant at the time he made the representation.
 A plaintiff may
 ive evidence a
 however, prove
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 or and obvious
 remark to the jury that the defendant must have known what was the common
 after the plaintiff

is not that strong evidence—morally at least—from which the jury may infer that what was the common opinion of trade shared by the defendant and that in making faith" *Not Ev* 136, *Woodroffe Ev* 193

examples of good faith Illustration (g) in section on the case of *the Chartier*, 1 Com B 13 In that case *Maule J* observed "The evidence was material and was properly admitted It intended to show that the defendant was not seeking to evade payments of goods ordered for his benefit but that he had actually paid the person with whom alone he had contracted It showed that the defendant conducted himself like a party who was dealing with Gas as principal and not as an agent for the benefit of the person with whom he was dealing" *circumstances surrounding*

to support it is then a vital part of the proof to rebut the presumption of fraud *Deus v Cornish*, 20 Ark 33 Illustration (h) is based on the leading case *R v Thurborn* 1 Den Cr C R 387 In that case *Parke B* said "The rule of law on this subject seems to be that if a man finds goods that have been actually lost or are reasonably supposed by law to have been lost and appropriates them with intent to take the entire dominion over them really believing when he takes them that the owner cannot be found, it is not larceny But if he takes them with the like intent though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny In such a case the question of whether the person is guilty of larceny is to be determined by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found and the circumstances in which it is found It may be apparent, in other words, that the person who takes the goods, at the time of taking, concludes that he took it, — the mere taking it up to

previous acquaintance with the ownership of the particular chattel, the place where it is found and the circumstances in which it is found It may be apparent, in other words, that the person who takes the goods, at the time of taking, concludes that he took it, — the mere taking it up to

he had reasonable ground to fear violence and to show that he acted in self defence *R v Hopkins* 10 Cox Cr 229 In *Allison v United States*, 160 U S 203 Chief Justice *Fuller* said "Here the threats were recent and were communicated, and were admissible in evidence as relevant to the question whether defendant had reasonable cause to apprehend an attack fatal to life or fraught with great bodily injury, and hence was justified in acting on a hostile demonstration and one of much less pronounced character than if such threats had not preceded it. They were relevant because indicating cause of apprehension of danger and reason for promptness to repel attack, but they could not be taken as evidence of a design to kill."

prosecution as son threatened with an actual killing in the absence of inference was that the consistent inference could not be drawn from the evidence that the defendant was guilty of the crime charged *Long C J* in *Thomas v*

territory 4 N M 150 a New Mexico case where he said "If there is even slight evidence to indicate that the act of killing was done under a present reasonable apprehension to himself of great bodily harm, prior threats should not be excluded" Evidence of communicated threats is intended to shed light upon the mental attitude of the prisoner toward the deceased when homicide

of the good which he had believed at a certain

time is worth very little without some kind of confirmation from external conditions. *Derry v Peel* 11 App Cas 337. In each case good faith as defined by the Indian Penal Code should be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. *Bhatoo v Mulji* 12 B 377 (393), *Emjor v Abdal*, 31 B 293 (293), *Arfan Ali v Emjor* 41 C 66, *Dave v Core*, (1901) A C 477.

In a case where an accused is charged with murder, he can assert that he has committed the crime in self defence. In such a case the state of his mind at the time of the killing becomes a material fact. An important element in determining his justification is his belief—in an impending attack by the deceased. So reasonable fear of such an attack rejects the conclusion of malice. And the character of the deceased for violence has much to do in determining the reasonableness or unreasonableness of his belief.

Negligence whether proved by habit. Negligence is in one aspect the not doing of a particular act but in another and more correct aspect it is the doing of one act in a manner which amounts to negligence in that some other

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engineer and fireman, had some times passed the crossing during the preceding year without those precautions observed. It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done or omitted to be done without any particular intent or purpose to injure any one, if it is intentional.

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give these signals on that occasion we think the enquiry was properly made as to what had not particular evidence grown in this case.

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If negligence can be inferred from repair of machine high way or the like after the con which negligence reason

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again, by fencing or covering, or at any rate making safe the particular thing from which it arose. That, however, is no evidence of, and I protest against it being put forward as evidence of negligence. A place may be left for a hundred years unfenced, when at last some one falls down it, the owner like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shows that he thought the fence was necessary because he put it up. This is both unfair and unjust. It is making the good feeling and right principle of a man evidence against him."

Ill-will, malice, etc. The term ill-will as used in the Act, is not the exact equivalent of the term the criminal intention. In a case of defamation the libel. If for any reason this presumption is rebutted, it becomes necessary for the person charged to show actual malice. In *Hellditch v Hellditch* said "It is for the defendant to prove if the defendant does so the burden of the plaintiff; but unless the defendant 'actual malice' By the exclusion of the criminal intention but a more positive mental

Roscoe Ev. 880, see also *R v Mason*, 8 Cr A R 121 (1912) transaction is material. In the case of the accused is admissible and of the accused is admissible commit the crime for which a person is upon trial are constantly received as evidence against him, as whether he has intention or has in each threats towards the emotion itself is evidential as an independent circumstance to show the act. So also where an emotion of hostility at a specific time is shown, the existence of the same person. What, that of each case, The state of mind for the time of uttering the defamation charged, other utterances of the defendant may

be offered, and the question arises whether and on what terms they are admissible. The probative value of other utterances as showing malice at the time charged rests on a double argument. (A) that the other utterance indicates malice at the time of utterance, and (B) that malice then indicates malice at the time charged. *Wigmore* §§ 103, 396-401. In *Barrett v Long*, 3 H. L. C. 395 (414) *Parke B.* said: "We are all of opinion that under such a plea the publication of previous libel on the plaintiff by the defendant is admissible evidence to show that the defendant wrote the libel in question with actual malice against the plaintiff. A long practice of libelling the plaintiff may show in the most satisfactory manner that he is a person of whom it is not surprising that he should be the subject of such attacks."

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Good will The term 'good will' is peculiar to the Act, and there is no equivalent for it in the English law, nor is used at all, except in a different sense. The answer to a charge of 'express malice' would probably be the absence of express malice or some sort of defence that implied it. This moreover, seems to be the meaning of the last clause of the illustration. *Donough Pt 123*

State of body or bodily feeling etc. This section also provides for the admission of evidence regarding the state of body when that is in issue or relevant. It would be in issue in all crimes of violence, or 'offences affecting the human body,' within the meaning of the Penal Code. It would be relevant in all questions of insanity, legitimacy, life insurance, inheritance, and identity of persons. *Donough Cr Pt 127* Illustration (l) shows how persons' expressions of feeling towards each other at or about any particular time may be used to show what those feelings were. (i) and (m) show the same thing in regard to states of body. *Cum Li 131* So whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence. And the question whether they are real or feigned, is for the jury to determine. *Greenl Li § 162 (a)* cited in *Taylor § 580*. Thus the representations by a sick person of the nature and effects of malady under which he is labouring are receivable as original evidence whether they may be made to the medical attendant, or to any other person, though the former are naturally entitled to greater weight than the latter, in as much as a physician is far more capable than a man unacquainted with the symptoms of diseases, of forming a correct judgment respecting the accuracy of the statement. *Arson v Annand, 6 East 188* *R v Blandy 18 How St Tr 1185*, *Grey v Young 4 MC 51*; *Gilchrist v Bale 8 Watts, 35* cited in *Taylor § 580* Illustration (m) is based on *Arson v Kinnaird, 6 East 188* So also answers of patients to enquiries made by medical men and others are evidence of their state of health provided they are confined to contemporaneous symptoms and are not in the nature of a narrative as to how, or by whom such symptoms were caused. *Gardner Passage Case Le March, 169*, *R v Nicholas, 2 C & K 246*, *R v Gloster 16 Cox 471*, *R v Andridge, 9 C & P 471*. The reason for the admission of such evidence is thus given by *Melish L J* "Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions there you may prove what he said, because that is the only means by which you can find out what his intentions were." *Syden v St Leonards L R 1 P D 134* This use of such statement is often spoken of as admissible under the *res gestae* notion or as 'original' evidence, and is an exception to the Hearsay Rule. But this seems clearly unsound. There is one sort of evidence of mental condition which is in truth merely indirect or circumstantial, and therefore not subject to the Hearsay Rule, e.g. where the sharpening of a knife on the morning before a homicide is taken as evidence of a design to kill, or where the repeated infliction of blows indicates malice or where running away is taken as indicating fear. But where a distinct assertion, in the form of words, predicating a mental state is offered,—as "I have a pain in my side" or "I have the intention of going out of town," or "I do this for such and such a reason,"—this language is no less an assertion of the existence of a fact than an assertion of any other sort of fact; in the neat phrase of *Bowen L J* "The state of a man's mind is as much a fact as the state of the digestion," and therefore such assertions, being taken on the credit of the declarant as testimonial evidence of the fact asserted, are met by the Hearsay Rule. To admit them, then is to make an exception to the Hearsay Rule. The different kinds of facts that may be the subject of such assertions may be roughly grouped as follows:—(1) assertions of pain, or other physical condition; (2) assertions of plan, design, intention, (3) assertions of feeling, emotion, motive, reason; (4) sundry assertions by a testator. *Greenl Ev § 162 a*, *Wigmore §§ 1714 to 1740*. It is usually said that such declarations are receivable though they form the only proof of the given condition (*Tay § 500*), but this has been doubted and it has been considered to be the *manifested condition* and not the *res gestae* itself which is the true *res gestae* to be explained. (*Thayer, 15 Jr L. T. 141—143*) *Phip Pt Int Cr p 51*. Mr. Cunningham thinks that statements in illustration

as to the circumstances in which he came to be poisoned should be admissible

Can. L.v. pp. 121-122

Such Statements are exceptions to Hearsay Rule. It has already been stated that such statements are exceptions to the Hearsay Rule. It presents itself in a on the consideration that, though the person's testimony on the stand may still be both actually and conveniently practicable yet the probability of their receiving from him testimony which shall be in value equal or superior to certain hearsay statements is small, thus, while there is hardly a necessity in the strict sense that Applied there is a own cont

possible to obtain by circumstantial evidence (chiefly of conduct) some knowledge of a human being's internal state of pain, emotion, motive, design, and the like; but in directness, amount, and value, this source of evidence must usually be decidedly inferior to the person's own contemporary assertions of those conditions. It might be argued, however, that the person's own statements on the stand would amply satisfy the need for his testimonial evidence. The answer is that statements of this sort on the stand where there is ample opportunity for deliberate misrepresentation or testing it by at times when of trustworthiness of Court and is a fair necessity of evidence in death, insanity, and this has not been questioned. *Wigmore* § 1714; see also section 21 clause (2)

In *Mason v Kinnaird*, 6 East, 195, which appears as illustration (m) of section 14 Lord Ellenborough in admitting such statements observed "A witness has been received to relate that which has always been received from patients to explain,—her own account of the cause of her being in bed at an unreasonable hour with the appearance of being ill. What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing. The declaration was upon the subject of her own health at the time which is a fact of which her own declaration is evidence, and that too made unawares before she could contrive any answer for her own advantage and that of her husband, and therefore falling within the principle of the case in *Skinner* to which I have alluded" (The case referred to by him was *Thompson v Treason*, 5 Skm 402) So "the evidence is admitted on the presumption arising from experience, that when a man does an act his contemporary declarations are made with some reason for misrepresenting" *Carter*, 8 II N. 42 "Wherever the bodily proved, the usual evidence These expressions are the natural reflexes of what it might be im-

nature of narration must be excluded" *Per Sawyer J in Insurance Co v Mosley*, 8 Wall, 397 So "such declarations made with no apparent motive

misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony for the same purpose" *Per Holmes J in Elmer v Fessenden*, 151 Mass 359

State of body In *Annesley v Anglessea*, 17 St Tr. 1139, where the question was whether the claimant was the vast amount of evidence was gone condition of *Lady Altham*, during

shortly before the claimant's birth in a belief to that effect cessation, a question d to be the heir to a son of *Lady Jane*

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Staunton, Not Tr, where four prisoners were charged with conspiring to cause the death of a woman of weak intellect by a slow process evidence was admitted regarding her bodily state at various intervals down to the date of her death "The object of his evidence" said *Hankins J* "is to show that those who were about her and saw her from week to condition to which she was being re physical strength of a person may be peculiarly capable or peculiarly incapable of doing the act in question. *Goodtitle v Braham*, 4 J R 498

Owner of vicious animals "Whoever" says *Lord Denman* "keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by it"

Johnson, 36 L. J. C. 1 (the knowledge of the f the animal is relevant '36 Particular acts of viciousness are also relevant, for the same reason Vide illustration (c) So l to show the owner's knowledge P 3, see also *Thomas v Morgan*, *Hudson v. Robert*, 11 Ex 697,

Receiving stolen property—Proof of knowledge The act of possession is in this class of cases (except rarely) concealed, and the question is as to the possession other times view of the her possession be each f the stolen character of warned the defendant

it may be assumed that the receipt of st likely to result in a warning, chiefly bec up and reclaim them, but also in part because a purchase not made in co offer

in the transactions, &c that the same person comes to dispose of the st *Higmore* § 311 ing stolen goods edged, within five l brought in the

defendant by the same person was admitted "guilty knowledge" See also *R v Davis*, 6 C. & Rob 524=1 Cox Cr 12, illustration (a) : S.

C 264 such evidence was held inadmissible. judgment said: "Here the evidence merely went to show that the prisoner was in possession of other property which had been stolen in December, and not that he had received such property knowing it to be stolen. Now the mere possession of stolen property is evidence, *prima facie*, not of receiving, but of stealing; and to admit such evidence in the prosecutor, in order to make out that a prisoner knowledge, what had been stolen in March, December previous stolen some other property from another place and belonging to other person" The result of *R v Oddy*, was a legislative change of the law in 1871 by Stat 34 & 35 Vict C 112 By section 19 of that Act "evidence may be given that there was found in the possession of such person property stolen within the preceding period of twelve months for the other purpose of proving that such person knew the property for which he is indicted to be stolen" But illustration (a) to the section makes no reservation as to ownership or time, so that it would seem that though the stolen property belonged to other persons than the prosecutor, and without

Jones, 14 Cox Cr 3

Forgery and Counterfeiting The Chief form of offence connected with forged and other counterfeit documents or money are (1) making the false

the inference of knowledge from such particular transactions, it would not make the evidence inadmissible" See also *R v Ball*, R & M 132; *R v Ball*, 1 Camp 324, *R v Millard*, R & R 245; *R v Phillips*, 1 Lew Cr C 105, *R v Smith*, 4 C & P 411, *R v Forbes*, 7 C & P 224, *R v Ball*, 7 C & P 429 In *R v Frost*, Dears Cr C 456, to prove a guilty uttering on December, 12, an uttering of a similar piece on December 11 was shown, see also *R v Goodwin*, 10 Cox Cr 531 In *R v Whaley*, 3 Leach 985, Thompson J. observed "As to the cases put by the prisoner's counsel of uttering bad money,

the knowledge of possession
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Insurance Society, 4 C. L. D 107, 24 N. W. 2d 201. In *Mason's Case*,

should be irrelevant in an enquiry as to his negligence in this respect on any particular occasion. Surely the evidence of habit would have some probative value. The same view has been taken by the Bombay High Court in regard to the second illustration, cl (c). It has been observed that on the issue of whether A actually shot B or not the fact that he had previously shot at him would have some probative force. So too would proof of a general malignity of disposition by evidence that 'A was in the habit of shooting at people with intent to murder them, yet this evidence is excluded, even as proof of A's intention, either as too remotely connected with the particular intention in issue, or as raising collateral questions which could not be resolved in the case' per *West J* in *Reg v Prabhudas*, 11 B H C II 90 at p 92.

"It is presumed that if evidence of 'habit' is not admissible as a 'state of mind' under section 14, it might be admissible as 'conduct' under s 8. Habit after all is only previous conduct which is provided for in section 8"—*Donough* *Cir Ev 2nd Ed* p 133.

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regularity of action, there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance. But in the ordinary affairs of life a habit or custom seldom has such an invariable regularity. Hence, it is easy to see why in a given instance something that may be loosely called habit

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connection with such evidence, both of them, however, depending on other exclusionary rules. (1) The idea of habit is sometimes difficult to distinguish from that of character—for example where negligent habit is charged, and if it is interpreted in the

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another or more correct aspect, it is the doing of one act in a manner which amounts to negligence in that some other act is omitted which ought to have

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than casual or occasional. If it is, are we not really predicating a careless

well founded, and that such evidence is often of probative value and is not attended by the inconveniences of character evidence *Wigmore* § 97

By s two verbal alterations were made in the original explanation and it was numbered as 'Explanation 1'. The Explanation 2, is new. This amendment was made by the Calcutta High Court in the case 14 C 721 (F B). In that case whether in the trial of a person charged with property, evidence could be given of the fact of the accused having been previously convicted of a crime of the same nature as the crime charged, the Full Bench decided on the 20th July 1897, that

the accused person has been previously convicted of a crime of the same nature as the crime charged, but the fact that he has a bad character given that he has a good character in which case it becomes relevant. *Explanation*—This section does not apply to cases in which the bad character of any person is in itself a fact in issue. * By Act III of 1891, the said section has been amended in such a way as to render the previous conviction of an accused person irrelevant when it is sought to prove the conviction with the object merely of showing that the accused is a man of bad character and is therefore more likely to have committed the offence with which he is charged. The fact that a person has been previously convicted of an offence has of itself little probative force to establish the fact that he has committed another offence and it is not expedient to admit evidence which can only prejudice the accused. *Statement of Objects and Reasons of Act III of 1891*. The result of this amendment of the law is that the rule as to the relevancy of a previous conviction is to be contained in section 43 of the Act. The existence of the judgment convicting the accused is only relevant if the fact of the conviction is a fact in issue or is relevant under some provisions of the Act. Explanation 2 has been added to section 14 so as to allow a previous conviction to be proved in order to show a guilty knowledge or intention. *Statement of Objects and Reasons of Act III of 1891*. As having regard to the character of the offence under s 400 I P Code, previous commissions of dacoity are relevant under s 14 of the Evidence Act so convictions previous to the time specified in the charge or to the framing of the charge

Section 43 of the Indian Penal Code prevention of the evidence that the accused was previously convicted of similar offence. *Aloomiya* 25 B *Jacob, J* dissenting. 189 the appellants were convicted, under section 431 of the Indian Penal Code of belonging to a gang of persons assembled for the purpose of committing thefts. The question was whether evidence of previous convictions of some of the accused of theft was admissible for the purpose of proving association for that purpose and bad character. In rejecting the evidence the Court observed: "It is sufficient to add in reference to the case now before us that the character of the accused was not in issue is not admissible." *King Em* Court observed that the evidence of previous convictions for the purpose of proving association for the purpose of committing offences whether for offence always been admitted, it would seem that of such

* In page 725 of I. C. this explanation is not given after section 54 although in the Act this explanation is given after section 14

more cogent than those for isolated thefts. Such evidence must of course be weighed. A single instance of theft for instance would count for little, or nothing. There to show habit, against the *Empress v. Nal* four unreported such evidence".

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bad character, is inadmissible under section 14 of the Evidence Act. *Emperor v. Hajji Sher Mahomed*, 45 B 958—75 Ind Cas 67—25 Bom L R 214. The reason for admitting such evidence is thus given by *Fauzett J.* in 46 B 958 "Such evidence clearly falls under section 14 of the Indian Evidence Act, as it is a disposition on the part of the accused to commit the offence charged."

question, but not of the exact description in issue. A person may be a habitual surreptitious night thief, but this goes very little way towards showing that he has a disposition towards dacoity. of bad character which is excluded by See also *Public Prosecutor v. Dongre* 1001—9 Cr L J 567, *Emperor v. Del* *Emperor v. Pachu Das*, 47 C 671, (is being tried for the offence of belonging to a gang of thieves, evidence that he was previously convicted of dacoity is relevant and admissible. But if the conviction took place long before the second prosecution no weight can be attached to such evidence for the purpose of proving that the accused has a habit of committing thefts. *Moti Ram v. Emperor*, 29 Ind Cas 127—A I R 1925 Bom course that the guilt 144. But purpose of affecting the punishment imposed. *Queen Empress v. Nga Ian*, (U B R 1892—1896) Vol I, 62.

Seditious speeches—Intention. Where certain speeches form the subject

in respect of the speech *nam v. Emperor*, 32 M 3 14 of the Evidence Act,

question is one of the intention of the accused in publishing these articles. Did they intend to excite in the minds of the people a feeling of enmity to the government of certain government men?

or it may be proved action with what such on another or other

conspiracy as to a diary kept by her, that she kept it to show to her husband was admitted to evidence her feelings towards her husband. But in *Walton v. Webster*, 7 C & P. 193, letters by a wife, offered to show her happiness with her husband, —

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do not prove it, but wherever it is material to prove the state of a person's mind, you may prove and out what
Fr. 442, *Wilde J*

in itself a material fact of which such statements are the fair exponents. But where those declarations are touched to prove the fact that he had declared and embodied those intentions in a certain will they have no other title to confidence than the statements of any other person who had seen the will and could speak to its contents. In this aspect they become mere hearsay. See also *Keen v Keen*, L R 3 P & D 107; *Wigmore* §§ 1718 1722, 1729, 1730, 1735, 1736

ably, defeated. We do not mean to say that fraud can be established by any less proof, or by any different kind of proof from what is required to establish any other disputed questions of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or

some bearing in proving fraudulent intention by negating the probability of good under ordinary good f produc invol consid transfers are male, (3)
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here no fixed rule can be laid down *Vide Wignmore* § 333. The fraudulent intent of the transferor may be indicated by other circumstances not of the above sort,—such as the debtor's remaining in possession after the mortgage or sale, the pendency of suits at the time of the sale and other circumstances suggesting their own significance and not raising any difficulty of principle *Wignmore* § 33.

Illustrative Cases—Admissible Evidence A writing made some time after the committing of an offence under section 124 I P Code is admissible in evidence under s 14 of the Evidence Act *Emperor v Phillip*, 30 Bom L R 315=108 Ind Cas 30=29 Cr L J 320=A I R 1928 Bom 78. Former judgment more than 25 years old and convicting accused of dacoity is admissible in a case under s 401 I P Code for showing criminal tendency to commit theft and not habit of committing theft *Motiram v Emperor*, 69 Ind Cas 29=A I R 1925 Bom 193, see also *Bonar v Emperor*, 38 C 408=15 C W N 461, *Emperor v Naba Kumar* 1 C W N 146; *Emperor v Haji Sher Mahomed* 25 Bom L R 214=75 Ind Cas 67. In a trial for an offence under ss 235 and 243 I P Code of being in possession of counterfeit coins and instruments and materials for counterfeiting coin, evidence of the possession by the accused of counterfeit coins and instruments for their manufacture at his house in another district is admissible *Mysr Gossain v Emperor*, 61 Ind Cas 647=22 Cr L J 407. On a charge against the accused of cheating by falsely representing that they were the servants of a wealthy lady and were entrusted to act on her behalf in the arrangements for loans, to be made to her, she possessed, and thereby acted in connection with the transactions complained of, the evidence tends to prove the charge *A 273*.

A series of similar acts committed by the accused at or about the time in question is concerned at or about the time in question. Evidence of such other acts, whether previous or subsequent to the frauds charged against the accused is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent *Gurdhara v Emperor* 209 P L R 1914. In cases where the other evidence has established an occasion for purposes of habitually committing theft, evidence of previous convictions whether for offences against property or for bad livelihood is admissible, not as evidence of character but as evidence of habit and of such evidence, convictions for bad livelihood would be more cogent than those for isolated thefts *Bonar v Emperor*, 9 Ind Cas 455=15 C W N 461=38 C 408.

Illustrative Cases—Inadmissible Evidence Where the accused is charged under s 409, Penal Code, for embezzling three specific sums *Held*, that evidence of collateral offences in respect of other sums was not admissible *Fritchard v Emperor*, A I R 1928 Lah 382. Where in a particular trial under section 420, I P Code evidence was let in with regard to a previous act of fraud which was alleged to have been committed by the accused person on the witness who spoke to the fact that on a particular occasion he was cheated by the accused in respect of a certain sum *Held*, that the evidence was clearly inadmissible in law and it cannot be brought in with the aid of s 14 or 15 of the Evidence Act *Golul v Emperor*, 29 C W N 483=86 Ind Cas 970=26 Cr L J 906, see also *H v Abdul Wahid* 31 A 91. In a case of murder by administering sweetmeats the facts that the accused offered sweetmeats to boys and poisoned one of them is not evidence under section 14 of the Evidence Act *Kashu Ram v Emperor*, 73 Ind Cas 262=G N L J 144. In a prosecution under section 209 of the Penal Code for having knowingly made a false claim in a suit against certain persons, evidence relating to other suits brought by the accused against other persons may be admissible against the accused under sections 14 and 15 of the Evidence Act, for the purpose of showing ill will or animus of the accused, and as systematic cause of fraud or a systematic series of fraudulent claims and for the purpose of rebutting the defence that the particular suit was brought in good faith or any suggestion that it was brought under some mistake or misapprehension. But evidence relating to similar suits brought by the accused against other persons is not admissible against the accused if it is not instituted by the accused or a conspiracy between

them Evidence which goes merely to the character or disposition of the accused as a person likely to have committed the offence is generally inadmissible against him. It is not admissible against an accused of other offences. N 491=19 Cr. was charged with an offence in excess of the evidence was produced to show that he was in a bad character.

Evidence of instances of acts of misconduct. The defendant can justify the label as true in substance and in fact by proving its truth, not the truth of other acts and occasions having nothing to do with the act in question, unless it is intended to show that those acts were parts of the habitual and continuous conduct of the accused. D 1038=19 Cr. was charged with an offence in excess of the evidence was produced to show that he was in a bad character.

being that a man must be taken to have intended the reasonable and natural consequences of his own act. *Unnava Jauala* 35 C 31. Where in a prosecution under s 304 I P Code it was taken part in a similar occurrence just previous to the offence of rash driving of his motor car certain evidence was produced to show that he was in a bad character.

being that a man must be taken to have intended the reasonable and natural consequences of his own act. *Unnava Jauala* 35 C 31. Where in a prosecution under s 304 I P Code it was taken part in a similar occurrence just previous to the offence of rash driving of his motor car certain evidence was produced to show that he was in a bad character.

Bom L R 324=A I R 1030 Bom 157

15 When there is a question whether an act was accidental or intentional, (or done with a particular knowledge or intention), the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Facts bearing on question whether act was accidental or intentional. The fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations

(a) A is accused of burning down his house in order to obtain money for

each of which he fires A received a sum of money to show that

to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

These words in s 15 were inserted by the Indian Evidence Act 1872 Amendment Act, 1891 (3 of 1891), s 2

(c) A is accused.

The question is,

The facts that,

counterfeit rupees to C, D and E are relevant, is showing that the delivery to B was not accidental

Scope of the section. Section 15 of the Evidence Act is an application of the general rule laid down in section 14 *Imperator v. Debendra*, 36 C 573-13 C W N 973=9 C L J 610. It lays down that where there is a question, whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant. It is wrong to say that this section only deals with bracketed words were added by s. 2.

overlooked in construing section 15. *Panchu Das* 21 C W N 501 at p 525 & L. but in the same case *Imperator v. J* took a different view. At page 516 he observed "There was no room for any hypothesis that the death of the woman, whoever might have caused it, was either accidental or unintentional. The medical evidence makes it incontestable that the act amounted to deliberate murder. No question consequently arises whether the act was accidental or intentional or was done with a particular knowledge or intention. In so far as the charge of theft was concerned, there was also no question, whether the act was accidental or intentional or was done with a particular knowledge or intention." *Fletcher J* agreed with *Moohery J* in that case. According to *Sanderson C J* also this section has no application where there is no question of an act being accidental or intentional. So evidence of other crimes is admissible if it bears upon the question whether the act alleged to constitute the crime charged in the indictment were designed or accidental. *Per Lord Harschell in Makin v. The Gen of New South Wales* 75 L J K B 693=(1906) 2 K B 339, see also *R v. Bond*, (1906) 2 K B 389, *R v. Heesom*, 14 Cox 40, *R v. Stephens*, 16 Cox 387, *R v. Armstrong* (1932) 1 K B 555. In *Gumicant v. Imperor*, 88 Ind Cis 723=18 N L R 35, which was a case under ss 467, 471, and 193 of the Indian Penal Code in respect of a receipt of Rs 4,200 discharging a debt, the complainant were allowed in the lower Court to file certain certified copies intended to prove that four different documents namely (1) a will, (2) a receipt, (3) a deed of lease, and (4) another receipt written by the accused K were suspected to be false documents and were not acted upon by Court. As regards the admissibility of these documents the Court observed. "There was no question here whether the writing, attestation, or production of the receipt for Rs 4,200 was accidental or intentional. Each was admittedly an intentional

act. The question was whether the act was done with a particular knowledge or intention. The fact that the act formed part of a series of similar acts of the kind of *Crown*, 12 P R 1 had been charged under s. 420 I P Code, for having received from the two complainants certain sums of money on false pretences that he had been authorised to recruit unskilled labour for the Government of Africa and that on no account of a false he would be able to do so, but that he had been authorised to do so, and that he had not allowed

to show that in the course of this recruiting business the accused had defrauded other persons from whom he had received sums of money on false pretences of a similar kind

In general whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence that the defendant has

same specific kind as th

Aurita Lal v. Emperor,

systematic act mentioned here should not be confused with design or system. (Vide p 236.)

'Section 14 provides that facts showing the existence of any state of mind, such as intention or knowledge, are relevant when the existence of any such state of mind is in issue or relevant and section 15 provides specifically for allowing evidence of similar occurrence in each of which the person doing the act was concerned, whenever there is a question whether the act is done with a particular knowledge or intention' *Per Lancel J in Emperor v. Harman*

valji, A I R 1926 Bom 231=50 B 174-38 Bom L R 115 This section
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obtaining money on false pretence-

In that case *Lord Coleridge, C. J* said
 the fact that the prisoner has done the
 remaining question is, whether at the time
 he guilty of his act, or acted under a
 ved must be admissible' This amendment

seems to have been overlooked by *Jacob J in Emperor v. Ahmija Hussain*,
 28 B 129=5 Bom L R 805, where he states that this section invites
 consideration of the question of intention only as opposed to accident.
Woodroffe's Ev 8th Ed p 208 This case probably goes further than
 any other case, and the amendment which has been proposed of section 15
 seems to provide sufficiently for the class of cases in which the peculiar
 nature of the offence makes this question the crucial test' In *Reg v. Ollis*
 60 L J Q B 918 *Bruce J* stated the law to be as follows "A line of
 cases has established the rule that when it becomes material to establish that
 an act charged in the indictment and proved to have been done, was intentional
 and not accidental, evidence is admissible of similar acts done by the same

Person (Ker v Gray, 11 &
 313), of false pretences
 I Q B 83), of coming
 12, 1 Bos & P N R 92
 er dit by fraud (*Rex*
 as necessary to negative

prisoner at the time of the offence charged against him, and, therefore negat^{ve} accident or mistake on his part in the last occasion'

Of course, such evidence is not admissible merely for the purpose of showing that the character of the accused was such that he was a person likely to commit the acts of cheating with which he is charged. That is a totally different question and the distinction between the two classes of cases is well brought out by *Channel J in Lee v. Fisher*, 26 L. J. R. 122: "The principle" said the learned Judge "was perfectly clear and if attended to the difficulty disappeared. That principle was, that the prosecution must not prove facts

was of bad character and therefore charged it was admitted that it showed that he, in a charge of embezzlement, was mistaken.

to show other instances of the same kind, because such evidence tended to show that he was not making a mistake on the occasion charged. Whenever it could be shown that the question involved was whether there was a mistake or whether there was a system, evidence might be given although it proved other offence that the prisoner's actions were systematic and fraudulent.

In *Reg v. Rhodes* 68 L. J. Q. B. 83—(1899) 1 Q. B. 77 the prisoner was indicted for obtaining eggs by false pretences and it was proved that he had falsely represented by advertisement in newspapers that he was carrying on a bona fide Dairyman's business. Evidence was admitted that subsequent to the transaction in question he had obtained eggs from other persons by means of similar advertisements and the Court for the consideration of Crown Cases Reserved held that such evidence had been properly admitted. In delivering the judgment of the Court, Lord Russell C. observed: "It seems to me quite clear that if the transactions with *Elston* and *Chambers* had taken place before that with *Boys* and at a period not too remote the evidence of *Elston* and *Chambers* would have been admissible against the prisoner. Is that evidence admissible although the transactions were subsequent to the offence charged? That depends as it seems to me on the question whether or not the case put forward for the prosecution was that the prisoner was not carrying on a real business but that the business in which he was engaged was from first to last a bogus or show business. If the prosecution merely alleged isolated transactions of a fraudulent character against the prisoner with no connection between them I should certainly say that evidence of transactions which took place after the offence charged was not admissible more especially if such transactions took place two months after the offence. But here as I have said, the charge to be made out was that of carrying on a bogus business and on the whole, I think the evidence was admissible on the ground that it showed part of a scheme to defraud persons by

In the same case it can only be shown do not see how way. If the offence charged would have been

immediately after the complaint or if they formed part of the same system of fraud I think it can make no difference. The only difficulty in the case is, I think, the long interval of time that elapsed between the act charged and the other acts. Very often the only *reus* between such transactions is the proximity in point of time. That however, is not the case here, and had there been no other connecting link, I should certainly have thought that the transaction two months after was at any rate too remote. But when it appears that the

in any other prior to the fear that they if they were of the same the only difficulty in the case is, I think, the long interval of time that elapsed between the act charged and the other acts. Very often the only reus between such transactions is the proximity in point of time. That however, is not the case here, and had there been no other connecting link, I should certainly have thought that the transaction two months after was at any rate too remote. But when it appears that the in and that if the charge was the evil act

becomes admissible

So to come under this section it must be established that the act forms part of the

some common had its own *Per Mookerjee* nces
 "whether they were evidence or not depends upon whether they were evidence of similar transactions" *Per Reading C J* in *Rex v Baird*, 84 L J K B 1785 To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different proximate in point of time
 2 C W N 676 at p 692; see
 v *Rhodes*, (1899) 1 B 77

Section 15 of the Evidence Act covers both previous and subsequent similar occurrences *Raghunath v Emperor*, 22 C W N 494-46 Ind C 18 696-19 Cr. L J 776

In a case of cheating, it is open to the prosecution to show that the acts charged against the accused were parts of a series of similar acts committed by him or in which he was concerned, at or about the time in question *Girdhari v Emperor*, 26 P W R 1910 Cr; see also *Emperor v Debendra* 86 C 573-18 C W. N 973-9 C L J 610, but see *Gokul v Emperor* 29 C W N 483-29 Cr L J 906-86 Ind Cas 970 In the case of *Blake v Albion Life Assurance Co*, 1 L R C P D 97 at p 166 *Lord Lindley* observed, "Nothing could, at first sight, seem more appearance of fraud; that the transaction precluded from doing

answer to the objection that evidence of frauds on other persons cannot be admitted in that this transaction is one of a class, that there are features in common, the features in common being the false pretence and a knowledge of it that
 5 L J
 1 cases

in my opinion, that the case which the prosecution seeks to prove is that the prisoner has in his mind a scheme or plan, say for obtaining money by fraud, and the other acts, of which evidence is sought to be given, when proved will show the existence of the plan, and, therefore the guilty mind of prisoner"

Evidence of the commission by the accused of previous or subsequent offences—General Principle of In *Malak v All Gen of New South Wales*, 75 L J K B 693, 703, 710 712=(1906) 2 K B 389, 409, 414 417, *Lord Chancellor*, *Lord Herschell*, said "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried On the other hand, the mere fact that the evidence adduced tends to show the commission of issue before the whether the acts were designed or accidental, or to rebut a defence which would be otherwise open to the accused" In *Rex v Do d*, 75 L J K B 693=(1906) 2 K B 389, *Mr. Justice Darling* and *Mr. Justice Bray* called attention to the fact that *Lord Herschell's* last words quoted above must have been intended to apply only to a defence which is really in issue, and that the words of the *Lord Chancellor* should be read with that limitation *Per Bankes J* in *Rex v Patten* (1913) 11 K B 163-82 L J K B 1670 In *Rex v Boni*, *supra*, *Mr.*

secondly, where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake, and thirdly, where the prosecution seeks to prove knowledge by the prisoner of some fact. In their judgments in that case it was pointed out by several of the Court that a single prior not be admissible as evidence of a recent case of *Director of Public Prosecution v. Ball*, (No. 1) 80 L. J. 1121 (1902), sub nom. *Reg. v. Ball*, (1911, A. C. 17) the Lord Chancellor, in speaking of the grounds upon which evidence was then admitted, previously carnally known to establish that they had a guilty passion towards each other and that therefore the proper inference from their occupying the same bed room and the same bed was an inference of guilt, or—which is the same thing in another way—that the inference suggested but the second admissible to

Evidence of death by poisoning. The question is whether the administration of poison to A, by Z, his wife, in September 1848 was accidental or intentional. The facts that B, C, and D (A's three sons) had the same poison administered to them in December 1849, March 1849, and April, 1849, and that A died on the 7th of April 1849, though 7 days after the death of A, are evidence of death by poisoning.

Pollock C B observed. I am of opinion that evidence is receivable that the death of the three sons proceeded from the same cause, namely, arsenic. The tendency of such evidence is to prove, and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic

a tendency - - -

in this case

57 and has

14 Cox 40,

See Pap 1451, *R v. Klosowski*, 137 Cent. Crim. Ct. Sess. Pap. 411. See also

R v. Roden, 12 Cox 630 (a trial for murder of a child by suffocation in bed). In

R v. Cotton, 12 Cox 400, (poisoning a child) evidence was admitted of the

the same poison. The prisoner admitted that he had given

his mother by poison. The prisoner's former

present wife was then their servant. The

at his second marriage and died in December

for cultural purposes, and there was evidence of

administration by the prisoners of articles of food in which arsenic might be

contained, and that three had died of arsenic.

that three had died of arsenic.

not supposed to be

evidently or

that the administration of the poison to the mother was wilful, evidence was

that the administration of the poison to the mother was wilful, evidence was

that the administration of the poison to the mother was wilful, evidence was

that the administration of the poison to the mother was wilful, evidence was

Cox 2111 On an indictment for murder by poison of S, evidence was admitted of the fact that S had been given arsenic, and that he had been given it; and it was also proved that S had been given it of the arsenic was also given to S and L. *See also 14 Cox 40*, see also *R v Flannagan*, 15 Cox 403, where Brett J took a similar view. *2 Russ Cr L 2112* In *R v Armstrong* (1922) 2 K B 555=91 L J K B 504, where the accused was charged with the murder of his wife by administering arsenic to a person with arsenic, the defence sought to rebut the defence kept by the accused. *1191=12 Cr L J*

Causing death by other means On the trial for the murder of an infant, it was proved that the prisoners had alleged that they had received only one child to nurse before, and had given it to a woman who had taken the child, with whose murder they were charged, for the payment of £3. It was also proved that other infants had been received upon payment of sums inadequate to the value of the child, and that the bodies of several infants had been found in the same place as that of the infant in question in the same manner as that occupied by the prisoners. On the issue of the value of the child, the defence was rightly refused. *(1894) A C 57, 2 Russ Cr 2112* Appellant was charged with the murder of a woman with whom he lived and with whom he had gone through a form of marriage. She was found drowned in her bath. Evidence was admitted that

defendant, by his cross-examination of prosecutor, had endeavoured to show that the gun might have gone off the first time by accident

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been made innocently, we may assume that any given one might have been innocent, but cannot concede this when we notice the recurrence.

pawn-broker upon a ring by the false pretence that it was a diamond ring. Evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawn broker upon a chain which he represented to be a gold chain, but which was not so, and had endeavoured to obtain from other pawn brokers a diamond ring, but

Francis, 43 L. J. M.

411=50 L. J. M. C. 11.

pretences. He was employed by his master to take order but not to receive moneys, and he was proved to have obtained the specific sum from B by representing that he was authorised by his master to receive it. Evidence of his having, within a week afterwards, obtained another sum from another person by a similar false pretence, such obtaining not being mentioned in the indictment in any way, is not admissible for the purpose of proving the intent when he committed the acts charged in the indictment. *Reg v Holt*, 50 L. J. M. C. 11. In *R v Simson*, 12 Cox C. C. 804, an order to be given of quality, for a book :

orders of the same sort was received to show the intent

In *R v Saunders*, 1 Q. B. D. 19, which was a case of false pretences by advertising to give work and requesting money by mail to pay for the preliminary instructions, the fact that a number of other persons have been induced afterwards by him in the same way to forward money on such advertisements was received to show intent. In *R v Smith*, 20 Cox C. C. 804, the charge was

The accused
Evidence of his
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evidence to show his intention. By the first transaction the prisoner obtained a

actions and we are of opinion that neither of those cases was of a similar character, and that the evidence of those two transactions was not admissible

Setting fire to 1
Gray, 4 F. & F. 1102
in a note to this case
this case in *R v Stan*
doubts its authority. The

fire had originated near the kitchen, where the accused stayed as servant

evidence is not without prece lent and authority, more over, not o
Donellan for the murder of *Sir Theodosius Broughton* by administering him
 some poison, evidence was given that a certain tree which hung over a deep
 and dangerous brook near a spot where *Sir Theodosius* was accustomed to
 fish had been swn almost in two by some unknown person. This was proved to
 show that some one entertained a design against the life of *Sir Theodosius*
 for he was accustomed to stand on the tree while engaged in fishing, and the
 natural presumption was that whoever cut the tree did so with the design of
 precipitating the deceased into the water. Those facts were given in evidence on
 the trial of *Donellan* for murdering *Sir Theodosius* afterwards and were received
 though quite unconnected with the prisoner, in order to show that some one
 entertained a design on his life and that the probability was that he had not
 come to a natural death. Of course the accused doing the act complained
 of must be proved by other evidence direct or circumstantial. See also the
 observation of *Telang J* in *R v Jayaram*, 16 B 414, where he expresses the view
 that such evidence is admissible. Here the principle recognised is that the
 recurrence of a similar fire may tend decidedly to negative innocent intent even
 though the author of the other fires is not shown, thus the prosecution having
 negruived innocent intent in the present fire by whomsoever set, the accused
 may be shown to have kindled it. On an indictment for setting fire to a rick
 of straw it appeared that the rick had been set on fire by the prisoner having

previous day it
 evidence and
 that circumstance

receivable. In many cases it is an important question whether a thing was done
 accidentally or wilfully. It is only by the conduct of the prisoner that a

admitted that on the same day articles were found on the at four in the
 in different parts of the house

Embezzlement Illustration (b) is founded on *R v Richardson* 2 F & F
 348. On an indictment for embezzlement where the entries of sums were correct
 but the castings up incorrect a series of similar errors in casting up were

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 that the entry was a mistake; but the probability of such mistake would be

greatly lessened by proof that other false entries of the same kind had been S.
made at or about the same time by the same person"

Extortion and black-mail. In *R v Cooper*, 3 Cox Cr 517, the prisoner was charged for feloniously accusing H C S of an assault with intent to commit an unnatural offence, with the intent to extort money. *Cresswell J* held that evidence of declarations of the prisoner on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard house, and accuse him of an unnatural crime, was admissible. The evidence was not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question was whether on this occasion he did an act with the design of effecting a certain object. One step in the proof was to shew that he would be likely to know that a certain result would follow, and if it could be proved that result would be produced, it was contemplated it. *Russ C* argument as here applied, seemed somewhat forced, such knowledge being a matter of common understanding and not needing to be proved. It is clear, however, that the intent argument is entirely applicable; i.e. the doing of similar acts at other times tends to negative the supposition that the demand on the occasion charged was made in good faith (for example with a genuine desire to obtain compensation for supposed injuries). This use of such evidence is generally sanctioned. Vide *Barnard's Trial* 19 How St Tr 820, *R v Hunt* 4 C & P 444, *R v Egerton R & R* 375, *R v Bosle & Merchant* (1914) 3 K B 339, but see *R v McDonnell*, 5 Cox Cr 153, *Hignmore* § 352, 2 Russ Cr 1168.

Rape with a limitation on the purpose of the act.

But mere liberties taken by the defendant

R v Lloyd 7 C & P 318
omit rape the evidence of
hit and having intercourse
Rodley's Case 9 Cr App

ten years of which the period of subsequent admissible files. I shall allow all the matters to be proved in order to show the real nature of the case. It has repeatedly appeared to me in cases of this sort that a man by a threat of violence deters the child from complaining and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions, and this seems to me to give a continuity to the transaction which makes such an evidence properly admissible.

Abortion. In *R v Dale*, where an instrument or appliance is used which might be properly employed for innocent treatment of woman Charles J ruled apted to cause guilty intent or a drug with

another woman three months later, to procure a miscarriage. It should only be admitted where the prisoner has suggested that the administration of the drug or the use of the instrument was legitimate or accidental on his part, and not where the defence is a denial of the act itself. And proof of only one other similar case, without any special connection with the case charged in the

5. certain mysterious is at liberty to ref not have had their to the conclusion evidence is not without prece lent and authority, moreover, for on the trial of *Donellan* for the murder of *Sir Theodosius Broughton* by administering him some poison, evidence was given that a certain tree which hung over a deep and dangerous brook near a spot where *Sir Theodosius* was accustomed to fish had been swum almost in two by show that some one entertained a for he was accustomed to stand on the natural presumption was that whor precipitating the deceased into the water the trial of *Donellan* for murdering *Sir Theodosius* afterwards, and were received though quite unconnected with the prisoner, in order to show that some one entertained a design on his life and that the probability was that he had not come to a natural death. Of course the accused's doing the act complained of must be proved by other evidence direct or circumstantial. See also the observation of *Telam J* in *R v Jayaram*, 16 B 414, where he expresses the view that such evidence is admissible. Here the principle recognised is that the recurrence of a similar fire may tend decidedly to negative innocent intent even though the author of the other fires is not shown, thus, the prosecution having negatived innocent intent in the present fire by whomsoever set, the accused may be shown to have kindled it. On an indictment for setting fire to a rich of straw it appeared that the rich had been set on fire by the prisoner having fired a gun very near it. It was proposed to prove that the rich had been on

that circumstance does not render it inadmissible, if the evidence is otherwise both. In many cases it is an important question whether a thing was done in a civil case in which the issue arises and the foregoing principle is applicable. In almost everyone of the foregoing classes of cases there are instances of the application of the principles in civil litigation. The nature of the issue and the kind of evidence offered, not the penalty or the civil form of the proceeding. *Hignore* § 371

Copyright infringement. In Copyright infringement cases the defence often is that the passage in question is taken from a common source. But if the hypothesis of other sources is not available as an explanation where the same errors—either of fact or of law—appear in two or more books. Accordingly the evidence is to a high degree by B from A. *Spiers v I* is unsatisfactory on the question whether the defendant did use the books which are contained in the family used the plaintiff's

extensive copying of other passages not otherwise shown to have been copied. This argument is always open, and its use has constantly been sanctioned, there can merely be a question of its weight in a given instance. *Longman v Manchester*, 16 Ves Jr 269, *Wanman v Teag*, 3 Russ 380, *Lewis v Julian* 2 Bell 6, *Hignore* § 373

ILLUSTRATIVE CASES

Illustrative cases—Admissible evidence. Accused were prosecuted for misappropriation by falsification of accounts made in 1925 and 1926, evidence was adduced by the prosecution of similar acts done by the accused before 1925. Held that the evidence was admissible under section 15 to rebut the probable

Aika reported this matter to the municipality. The accused was charged under s 77 (2) of the Bombay District Municipal Act for introducing the said goods within the Octroi limits without paying dues. *Held* that the evidence that the accused had been connected with similar cases is the one under charge was inadmissible to show his knowledge and intention. *Emperor v. Haynam Lal*, A I R 1906 Bom 231-50 B 171-28 Bom L R 115. The accused on the 7th June 1909 administered *dl utura* poison to A and B both of whom died from the effects thereof and on the following day administered the same poison to C and D. The former got ill and recovered but the latter died. *Held* that the events which occurred or were said to have occurred on the 7th and 8th of June were relevant to the case of charge of murder of D as forming incidents in series of similar transactions occurring about the same time and tending to show system and intention and to negative the idea of accident. *Lala v. Emperor* 9 Ind Cr 731-32 P L R 1911 see also *Kasnam v. Emperor* 73 Ind Cr 262-63 N L J 141. Where in a trial upon a charge under section 399 of the Penal Code the accused pleaded that their presence at a particular spot, armed and in company, which in themselves show that one or more men

the accused were part of a series of similar acts committed by him or in which he was concerned at or about the time in question. Evidence of such other acts whether previous or subsequent to the frauds charged against the accused is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent. Evidence merely to prove that the accused person's character is such that he is likely to commit the act with which he is charged is not admissible. *Girdhari v. Emperor* 20 P W R 1910 Cr-6 Ind Cr 961. In a charge against the accused of cheating by falsely representing that he was the Dowry of an estate and could procure employment for the complainant and thereby obtaining a

di honest

O C L J

C 407

Illustrative Cases—Inadmissible evidence. Where the accused was charged under s 407 Penal Code for embezzling three specific sums. *Held* that evidence of collateral offences in respect of other sums was not admissible. *Pritel and v. Emperor*, A I R 1928 Lah 382.

substance and in fact by proving its truth not the truth of other acts and occasions having nothing to do with the act in question, unless it is intended to show conduct
130
1 review

but had falsely charged and got convicted some other persons as murderers *Gangaram v Emperor*, 62 Ind Cas 547=22 Bom L R 1274=23 Cr L J 529 Two persons A and B were tried on 21st July 1919 for the offence of murdering D a woman of the town, on the 10th December 1914 of conspiring to rob her, of theft of property from her house and for abetment of murder and theft At the trial the prosecution wanted to adduce evidence (1) of the association of the two accused, (2) of their association in cases spoken of by other women of the town in connection with the charges of theft which they made against them and generally of a series of incidents from 1911 to 1918 that they used to go about together under different names A taking B with him as his *durwan* and introducing himself as a Babu to rich prostitutes of the town and this being followed by their subsequent disappearance and discovery of loss of money and ornaments Held that the evidence was not admissible *Emperor v Panchu Das*, 24 C W N 501 (F B) In a case under s 49 of the I P Code the question of the guilt or innocence of the accused depends upon proof of actual facts and not upon the state of the accused's mind Therefore evidence as to any previous act of fraud (committed by the accused) is not admissible under any provision of the law *Gokul v Emperor* 29 C W N 483-2 (F L J 906=86 Ind Cas 970 (But see *Emperor v Delendra* 35 C W N 923=9 C L J 610, and other English cases) In a trial of an accused person for giving false evidence in respect of an alleged forged document 'to judge of the intention and knowledge of the scribe and attesting witnesses by the opinion of other Judges on other documents written and attested by these persons in suits and proceedings to which they were not parties is a use of section 15 of the Evidence Act which was never intended by the Legislature *Gunnul v Emperor*, 38 Ind Cas 723=13 A L R 95

16 When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact

Existence of course of business when relevant

Illustrations

(a) The question is, whether a particular letter was despatched

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place are relevant

(b) The question is, whether a particular letter reached A The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant

Principle Of the probative value of a person's habit or custom as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt Every day's experience and reasoning make it clear enough *Higmore* § 92 Customs may, like any other facts or circumstances, be shown where their existence will increase or diminish the probability of an act having been done or not done, which act is the subject of contest *Per Hanlan J in Waller v Dixon* 6 Minn 503, 518, (Am) In another American case *Sargent C J* said, 'It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it, in a particular way, according as he is in the habit of doing or not doing it' *State v Rail Pond*, 52 N H 523, 532 In *Watkins v O Neil*, 91 Mo 527=6 S. W. 25, (Am) evidence of a book keeper's custom of handing over collateral notes, to the teller, indicating that it was done in this instance was admitted The reason of such admission is thus given by *Sherwood J* It is really immaterial, under the authorities cited, whether he was able to do more than to verify his entries and prove his invariable custom These things being proven the presumption is therefrom that the usual course of business was followed in this instance Every one is presumed to govern and consequently that he acquiesces himself of his custom if it is established that one act is usual and another, the latter

being proved, the former will be presumed, for this is in accord with the experience of common life. It is simply the process of ascertaining one fact by the inference of the notion of regularity of action, there can be no doubt that this fixed sequence of acts tends to show the occurrence of a given instance. But in the ordinary affairs of life a habit or

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circumstances of each case. *Wigmore* § 92

Scope of the section. In commercial transactions the presumption is that the usual course of business was followed by the parties thereto. *Henry v. Bensie*, 37 Fla. 609. "Where the maxim of *omnia praesumuntur rite et solemniter esse acta* (all acts are presumed to have been done rightly and regularly) is taken place on Tuesday, is strong evidence. C. & B. 973. So to prove any general course of

business or office, whether have been done there or will be followed in a particular public office, e.g. the Post Office. *Phipps v. L. 102*. There is no presumption that

is based on this case. particular letter. In must go further. Some the table in the counting poster, and he had said

of a "You from led the ques-

Loan Assn., 47 Pac. Rep. 13 (Wash.) it was said. "The evidence that a letter left at the Tremont House and addressed to H actually reached him is of the same

by post, it is *prima facie* proof, until the contrary be proved that the party to whom it is addressed received it in due course. See also *Sunderson v. Judge*, 2 H. Bl. 609, *Woodcock v. W. & S. Shingley & Todhunter*, 7 C. & P. 680 (686), *Ab. v. Louren*, 1 Camp. 175, *Plumer's case*, 11 Q. B. 1, *Case v. 551, Household*, *Ware v. Grant*, 48 L. J. 1, *J. K. B. 177, Husford v. Levering*, 6 Wheat. 102. that it was delivered to a clerk. letter, took all letters delivered

Camp 193, *Trotter v Mr Lean*, 13 Ch D 571; *Phay Es. 3rd Ed* 97, *Skidell v Garbett*, 7 Q B 816, *Ward v. Lonsborough*, 12 C B 252; *Percy Super Club v Whyte*, 106 L T Jo 303 But without any proof that it was properly addressed, stamped and posted, there is no presumption of its receipt. *Beck v German Ins Co* 68 Mo (Aps) 520 (U S). So where a person refuses a registered letter or notice he cannot afterwards plead ignorance of its content. *Lutf Ali v Panna Mohan*, 16 W R 223, *Jogendra v Dirarla Nath*, 15 C 631 *Gurish Chandra v Keshore Mohan* 21 C W N 319; *Louis Dreyfus v Humeau Das*, 50 Ind Crs 191

A telegram properly addressed is delivered to a telegraph company. The presumption is that it was received by the addressee. *Oregon Steam Co v Ol* 100 N Y 446, *Gerding v Hartin* 21 N Y 5 636 To prove that a certain indorsement had been made on a (lost) licence entered at the custom house it is relevant to show that the course of the office was, not to permit the entry without such licence. *Butler v Illmit*, 1 Stark 222, *Purpion 3rd Ed* 97, *Taylor* § 153 A; *Ian Omeron v Douet*, 3 Camp 11, *Waddington v Roberts* L R 3 B 779

In an action against the acceptor of several bills of exchange which were made in November, 1850, and became due on February 5th and March 12 1851 the defence was that they were accepted by the defendant while an infant. It is proved that the defendant came of age on March 11th, 1851. The presumption is that all the bills were accepted before he attained his majority. *Roberts v Bethel*, 12 C B 779 The reason of this presumption is thus expressed by *Jessie C J* 'There is nothing on the face of the bill to show when it was accepted. Why then is it that this evidence is sufficient? It is because it must be presumed that the bill has been accepted during its currency, and consequently before the commencement of the action, because it is the usual course of business to present bills for acceptance before the time for the payment of them has run out and within a usual time after the drawing of them. I decide this case upon this broad ground, that we are to presume, unless the contrary is shown that a bill of exchange has been accepted not on the day of its date, but within a reasonable time afterwards. It is not to be presumed that the acceptance took place after the maturity of the bill. That view disposes of the case as to all these bills—74 to 81 of them because they became due before the defendant attained the age of twenty one 75 to the sixth, because a reasonable time for its acceptance had elapsed before the defendant's majority. "And Maule J added "Although it is not usual to accept a bill on the day on which it is drawn, it is usual to do so at some early opportunity after that day. Therefore, where the drawer and acceptor are both living in the same town the presumption is that the bill is accepted shortly—within a few days—after it is drawn, it being manifestly the interest of the drawer to have a negotiable instrument made perfect as early a conveniently may be. The date of the bill, therefore though not evidence of the very date of the acceptance is a reasonable evidence of the acceptance having taken place within a short time after that day regard being had to the distance the bill will have to travel from the one party to the other. Upon the same principle upon which this presumption rests it may be presumed in this case that the bills were accepted before they arrived at maturity.' It is alleged in a bill for relief that a certain agreement was in writing. The presumption is that it was signed. *Hart v Hobson*, 1 Ser & Sin 553

Course of business meaning of—The expression "course of business" must mean the ordinary course of a professional vocation or mercantile transactions, or trade. *Angana v Bharmappa*, 23 H 63 (66). The usage in a private house, however methodical, cannot carry the same weight as the ordinary routine of office. *Rid*

Regularity in Public Office It has already been stated that the fixed method and systematic operation of the Government postal service have long been conceded to be evidence of the due delivery to the addresser of letters, notices, etc. duly placed for that purpose in the custody of the authorities. The only requisites to raise a presumption of due delivery are that the letters are duly stamped, addressed and posted. *Waller v Hynes*, Ry & M. 149, *Silberk v Garbett*, 7 Q B 816, *Percy Super Club v Whyte*, 106 L T Jo 303. This presumption is so universally conceded that the strength of the evidence of this kind has been even raised to a presumption (see illustration (j) to section 114, *Madhapath v Oti*,

10 L J Ch 39) Of course it is always open to show circumstances which would rebut that presumption. The requirement has given rise to the strength of this presumption is so great that provisions have been made in certain Statutes for the purpose of not allowing the presumption to be rebutted. *Indian* which exports much, 2

Camp 44 Taylor § 180 : An envelope produced bears the post mark and date of a certain office letter was mailed and sent at this time 15 Conn 206 (Am), Rollin 7 M & W 515, Langels v Thompson 2 Camp 623 R v Plumer R & R 264, Butler v Mountgarret, 6 Ir L R N S 77 Taylor, § 179

Course of business in private firms The habit of a private house doing business systematically a similar service being equally relevant the principle has been applied to an export of telegrams transmission g v Scott 112 of telegrams application of the course of business to of a notice or business followed further evidence

where is in the case of private business the system alleged to have been followed must be proved like all other facts The course of business of an individual firm may under the circumstances not appear sufficiently fixed to be of that probative value a) was placing posting 61, the house

to send circulars on every change in the firm was a limited In the course of his judgment Lord Hinger said That does not show that a particular person received a circular except upon the presumption that a jury may make upon the general habit In Woodcock v Houlsworth, 16 M & W 124 Parke B said

He has certainty or 1 H I C Labroel 3 account to a sum in case of injury at a high evidence was limited highway Hall v Bro 1 preceding month was admitted to show a specific sale In admitting such evidence the Court observed Where there is a question whether a particular act was done, the existence of any course of business according to which it was done is a receipt for rice was admitted 18th v

In Lucas v Nozostheski 1 offered to the defendant

workmen Birch 3 Camp 10 which was ed over to his employer over the receipts daily was have been consigned to

In *Laughan v R Co* 63 N C 11 (1m) where the question was whether goods have been received by a railway company evidence of its custom to weigh and mark goods was received as showing that they would have been found marked. In *Hine v Promeroy* 21 Viet 211, 214 (1m) the question was whether an attorney had directed a process server to take N and M as receptor. Evidence of his uniform course of business to give no instructions as to receptors was admitted as corroborative. In *Huward v Surrood*, L R C P 143, the question was whether the defendant's servant who had warranted a horse sold to the plaintiff had authority to do so. It was held probable non-existence of such authority, evidence was offered of a usage among horse dealers not to warrant under the circumstances.

Refusal of a registered letter. The use of a post mark in evidence involves at least three distinct principles. In the first place, the question arises, may it be inferred from the presence of what purports to be the official mark that the mark was genuinely affixed by an officer of the Post Office concerned? This is a question of authentication and may be answered in the affirmative, though there has been some fluctuation of judicial opinion on the subject. In the second place the question arises whether if the post mark be taken as genuine it is evidence that the cover bearing it was stamped on the date the impression bears. The answer is in the affirmative. In the third place, the post mark is evidence that the place or office mentioned therein was actually the place where it was affixed. The mere fact of a notice bearing a certain date is no proof that it must have been posted on the same date. An article posted and delivered may be inferred to have been delivered in due course of post. *Gobinda v Dwarika* 20 C L J 455 = 19 C W N 499.

Telegrams—Times of delivery. The documents kept by the Post Office showing the terms of receipt and delivery of telegrams are not admissible in evidence as public records in as much as they are kept only a short time and are not accessible to the public and are not the result of public enquiry and do not deal with a general public right but are merely kept for the purpose of regulating the pay and the work of the post office servants. *Heyne v Fiehl*, 110 L T 264 = 30 L R 190.

ILLUSTRATIVE CASES

Admissible evidence—Illustrative cases. A notice was sent by the plaintiff firm to the defendant firm by registered letter which was posted to the correct address of the latter, but was returned with the word 'refused' endorsed upon it by the Post Office. Held that under section 16 of the Evidence Act the presumption was that the letter had reached the hands of the defendant firm. *Louis Dreyfus & Co v Chumandis* 50 Ind Cas 190 = 2 S L R 147 see also *Jogendra v Dwarika* 10 C 691 *Balaram v Bali Pannabai* 11 Ind Cas 351 = 13 Bom L R 373. The question is whether a letter was sent on a given day. The post mark upon it is deemed to be a relevant fact. *R v Cunningham* 19 St 370 *Gobinda v Dwarika*, 20 C L J 455 = 15 C W N 499 = 26 Ind Cas 96. In a suit by one banking firm against another firm for the recovery of the balance of an account between them it was held with reference to the keeping of the firm's account books and their personal transaction to the principals that it was reasonable to presume that that which was the ordinary course was put used in that case. *Dwarika v Baboo* 6 M I A 83 (90).

Inadmissible evidence—Illustrative cases. An endorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain day and had been refused by him, is at best a record of the statement by the peon and would be admissible either under section 32(2) or section 33 of the Indian Evidence Act, if the requirements of those sections are fulfilled. If it be not admissible under sections 32(2) or section 33, in itself the events recorded therein by the peon must be proved by calling him a witness. *Gobinda v Dwarika* 26 Ind Cas 96 = 20 C L J 455 = 19 C W N 499. To prove the facts that he sent the letter, and that he returned it, and that he had returned it to the clerk this is not enough. *Toosey v Wall* 97 So also where the clerk proved that the letter

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ceive it (*Re London etc*
e also *Ram Dass v Official*
posted to H at Bristol,
" is insufficient *Walter v.*

Haynes, Ry & M 149

ADMISSIONS.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Admission defined An admission is defined by *Stephen* to be "a statement, oral or written suggesting an inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceedings." *Step. Dir. Cr. Act* 15. "An admission" says

relevant fact made by a party to an action, or by a person deemed to be entitled to make such statement on his behalf. An admission is a relevant fact as against such party." *Solicitors' Journal* Vol XX p 894. The definition given in the section eliminates the implied statement as to the existence of a probative or *res gestae* fact arising from the acts of a party, "admission by conduct" so called. In English law the term admission, means any statement made out of the witness box by a party to the proceedings, whether civil or criminal, or by some person whose statements are binding on the party against his own interest. *Wills' Ev* 2nd Ed 149. "In our law," says *Mr Taylor* "the term admission is usually

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admission been tendered in evidence to establish the charge of any misapplication of the money by the noble defendant, it would clearly have been rejected. The law was thus stated by *Lord Chancellor Erskine* "This first step in the proof" (namely, the r

in now on trial may be affected
it by the pay-master would in itself
convict him of a crime" *Lord*
Taylor § 721 citing *verbalum* from

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made by an accused person is an admission only, or amounts to a confession, no reference must always be made to the terms of the statement. Every statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, made by an accused person is an admission under s 17 and of the Evidence Act, which is provable against the person making it, and

6 In *Taughan v R Co* 63 N O 11 (1m) where the question was whether goods have been received by a railway company evidence of its customer to weigh and mark goods was received as showing that they would have been found marked. In *Hou v Promeroy*, 21 Vict 211, 211 (1m) the question was whether an attorney had directed a process server to take N and M as receptors. Evidence of his uniform course of business to give no instructions as to receptors was admitted as corroborative. In *Houart v Sherwood*, L R C P 149, the question was whether the defendant's servant who had warranted a horse sold to the plaintiff had authority to do so. To show probable non-existence of such authority evidence was offered of a usage among horse dealers not to warrant under the circumstances.

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that the plaintiff had said to the defendant, "You always promised to marry S. 1 one, and you don't keep your word." The court held that this was "material evidence." *Steen* (1877) 2 C P D 265 (270), 1.

Admissions are statements, or assertions in words, and it is their inconsistency with the party's other assertions that discredits the latter. Hence conduct cannot

has been suggested that an affirmative fact diminishing present evidence, should be taken the stand as a witness and to his position in the case if he does not. So far as the suggestion emphasizes the truth that there is, in principle, no distinction between statements of a party and the other facts introduced by him to the tribunal, it seems sound and helpful. An admission however presents no necessary implication of inconsistency or other injury to the cause of the declarant. Undoubtedly former statements are frequently used to show inconsistency between the declarant's present position and one which he occupied at an earlier time. Such statements are not strictly speaking admissions. A former admission may be used to prove the truth of the fact stated. Such a statement may be used as a mere verbal act to show inconsistency. But such is not the only use which may be made of it. It may be used as true or as contradictory. Either party, in proving his own case may, instead of introducing evidence to a certain effect show that his adversary has unequivocally

Chambers v. L. & S. 1-20 (24)

There are two kinds of admissions according to the first formal admission, which may be made by a party in his pleading, or by stipulation or by statement in open Court. Secondly there is a statement of a fact at some previous time inconsistent with a fact to be established at the time of trial a statement which, when of evidence direct or circumstantial, an inference or inferences as to the truth.

§ 64 As to the formal admissions little need be said. They simply fix the relation between the parties as to the facts. They help to define the issues concerning which evidence is to be heard but they are not in themselves evidence. As to the second kind of admissions, those which may be called evidential

lusiveness, that tantial evidence, case they are

may in themselves to carry conviction. *McNeeley v. L. & S. 1-20*

Direct Admissions Direct and express admissions are practically the same. They are direct statements of main facts in issue. As regards this kind of admissions there is nothing to be said, except that to be available, the statements which constitute the admissions must be proved in the ordinary way. The form in which the admission is made is immaterial so that it amounts to a statement of fact, and is not a statement of opinion or promise. *Driscoll v. City of Taunton*, 160 Mass 486 (Am). The proof of a direct admission is usually by the introduction of testimony, oral or written, as to the language constituting the admission. The statement constituting the admission may be oral or written. Its form is immaterial. So, also, are the place and circumstances attending its making. It may have been heard by witness over a telephone. *Holfe v. Railway Co* 97 Mo 173-10 Am St Rept 331 (Am).

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Admissions are in the nature of circumstantial evidence. Indirect admission may be found in the following cases:

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the direct admission is the statement which by omission becomes evidence of some fact. When we go still further from the direct admission, we finally reach the field of a admissions by conduct, or in what are frequently spoken of as implied admissions, and which are simply circumstantial evidence. According to *Bo* 'implied admissions are those which result from some act or failure to act of the party. *Bourne's Law Dict*. They may also arise from acquiescence. An implied admission is proved by introducing testimony as to such conduct as shows an acknowledgment of the truth of the fact in question. There are various cases of implied admissions strictly speaking. In most instances when actions or conduct are introduced as bearing upon the truth of a fact it is as circumstantial proof of the fact itself and not as proof of an admission. The term 'implied admission' is often element of admission is frequent admissions by conduct are not included.

Admissions by conduct are not limited to a statement oral or documentary. An admission by conduct has been dealt with in section 8. Such admissions are admissible not as an exception to the Hearsay rule. They are useful original circumstantial evidence of the facts to which they relate. *Best Ev 148* citing *West Chester v McClure*, 67 Pa St 311 (Am). Presumptive. — — — — — has been seen in the

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which treats as admissions by a party, statements made in his presence and denied by him provided the circumstances were such as to make a denial necessary. *Ibid*

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course of judicial proceedings in a case of record or in connection with judicial proceedings so classified as extra judicial *Chamberlayne*.

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administered to a witness in order to impose an additional obligation on his conscience and so to add weight to his testimony, and he is cross examined to

But in occasional warrants are generally declarations of nothing in made against the person's interest. The simple and broad rule for receiving them is, in the language of Chief Baron Pollock, that if a party has chosen to talk about a particular matter his statement is evidence against himself (*Darby v Ouseley* 1 H & N 1) and the theory of their use seems to be that they are to a party what prior inconsistent statements are to a witness viz, a means of discrediting smaller or the plaintiff he saw after

attention to speak the truth confesses a crime, there is little human conduct are sufficient

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that so ply to get a prior statement of the party against the statement now advanced by him in his pleadings or through his witnesses, and thus discredit the present claim by its inconsistency with the former one. *Greenl Ev* § 169, see also *Phy Ev* p 221

Mr. Gulson while allowing that admissions are evidence of the truth of the fact admitted, considers them not to be exceptions to the Hearsay rule, because the inference of truth involved is independent of the personal credibility of the declarant, but regards them rather as relevant facts, evidentiary of the facts

Ev 221

But even from this point of view, they have two kinds of probative value

"(a) One is the ordinary value of value depending on his capacity to him or interest or lack of it, and so on satisfied, but that is a rule of law

probative value as those of any

they have additionally the same

Just as a witness testimony is discredited when it appears that on another occasion he has made a statement inconsistent with that testimony so also the party opponent is discredited when it appears that on some other occasion he has made a statement inconsistent with his present claim against him. The witness speaks in Court through his

his part includes the whole testimony relied on by him. The party opponent may be used against him as an admission, provided it exhibits

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admissions do happen to state facts against interest, admissions are generally treated
as obnoxious to the Hearsay rule, and are only allowed as exceptions to it (*Vide*
Taylor Ev § 723) In such cases, as the statements are against the interest of the
persons making it, their trustworthiness is supposed to be guaranteed That this is a
mere local error of theory and in no sense represents a rule anywhere obtaining may

... been enforced for the use of a party's admissions (*Vide Woolway v Rowe*, 1 A. & E.
... ion of that
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... obative weight, it would not, however,
be essential to admissibility To secure that, it is sufficient that the statement
should be the voluntary act of the party and cover a probative or *res gestæ* fact.
(c) The declaration against interest is secondary ...
the declarant is shown to be dead, absent from
some other sufficient cause. The admission, o.
and is competent though the declarant be present
(d) An admission may be made at any time The declaration against interests is
incompetent if made *post litem motam*. (e) The admissibility of a declaration
against interest is governed by the rules of sound reason That of admission is
determined largely by procedure. *Chamlerlayne's Ev.* § 1235.

Admissions whether subject to rules of testimonial qualifications such
as personal knowledge, infancy, Opinion Rule etc.—“A primary use and
... claim by
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“whether oral or in writing, contain matters stated as mere hearsay, it may be ques-
tionable whether such matters can be received in evidence. If tendered against the
party making the statement, they are clearly entitled to very little weight, and unless
connected with a further admission, that he believes them to be true, they would seem,
like hearsay declarations against interest, to be inadmissible *Lord Trimbleton*
v. Kemmis 9 Cl. & F. in 780, 784” *Taylor* § 737 *Mr. Justice Chamber*, in the case of an

answer in Chancery, read against the party in a subsequent suit at law, thought that portion of it not admissible for he added, 'it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only in the course of the answer to a bill filed for a discovery. But where the answer is offered as the admission of the party against whom it is read, it seems reasonable that the whole admission should be read to the jury, for the purpose of showing under what impressions that admission was made though some parts of it be only stated from the hearsay and belief. *Greent, Ev* § 203, *Taylor Ev* § 737. But *Stephens J* in *Kitchen v Robbins*, 29 Gr 713 766 (*Am*) expressed contrary view where he said 'Are no admissions good against a party unless founded on his personal knowledge? The admissions would not be made except on evidence which satisfies the party who is making them against his own interest that they are true, and that is evidence to the jury. It does not come in on the ground that the party making the admission does not believe it, but upon the ground that a party does not believe it unless they are true. The fact that he reasonably explained only on the supposition that he is constrained to do so by the force of evidence. The source from which a knowledge of fact is derived, is a circumstance for the jury to consider in estimating the value of the evidence but that is all.' See also *Wigmore* § 1053, *Bishop of Meath v Marquis of Winchester*, 3 Bing NC 183 (203) *Bulley v Bulley* LR Ch App 739 (747). But such considerations do not apply when a party wants to use testimonially his own admission in his own favour under clauses 1 to 3 of section 21. In such cases personal knowledge seems to be necessary. In *R v Wilker* 1 Cox 93 where the question was whether, A was an infant at the time of making a certain contract, an admission by A that R was so was received against him although founded on hearsay. See *P v Symonds* 4 Cox 277 *Re Peston* 53 L T 766. As to statements by an agent containing hearsay or opinions see *The Acton* 1 Speaks E & A 780, *The Solway* 10 P D 137 cited in *Phil Ev* 196 216.

On the same principle the admission of an infant party would be receivable. *O'Neill v Read* 7 Ir L R 434. See also *Dharamaji Vaman v Gurrar Shrinivas* 10 B H C R 311. Theoretically, the admissions of a lunatic party would stand upon the same footing, although the weight to be given them might be less. *Wigmore* § 1053. The opinion rule also does not limit the use of a party's admission. *Doe v Stell*, 3 Camp 115. But a bare statement that a party is informed without addition of his belief in the information will not amount to an admission. *Framblestown v Kemmis* 9 C & P 780, *Roe v Ferrat* 2 B & P 584, *Phil Ev* 196.

Admissions, just as a party's, the present points of proof. Admissions in the sense of inconsistencies are not peculiar to civil cases. *Greent Ev* 170. Admission in a civil suit that a document is genuine cannot in a forgery case be regarded as a confession at all. *Per Rankin C J* in *Ambar Ali v Emperor* A I R 1929 Cal. 539. 'A confession says Prof. *Wigmore* "is one species of admissions namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge." *Wigmore* § 1050, *Taylor Ev* § 724, *Steph Dig* 170.

Admissions on is usually applied in cases which do not involve issues usually used in Criminal Court as in a criminal case may make things inconsistent with admissions, just as a party's, the present points of proof. Admissions in the sense of inconsistencies are not peculiar to civil cases. *Greent Ev* 170. Admission in a civil suit that a document is genuine cannot in a forgery case be regarded as a confession at all. *Per Rankin C J* in *Ambar Ali v Emperor* A I R 1929 Cal. 539. 'A confession says Prof. *Wigmore* "is one species of admissions namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge." *Wigmore* § 1050, *Taylor Ev* § 724, *Steph Dig* 170.

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Admission and confession distinguished.—Admission is usually applied to a civil transaction and to those matters in criminal cases which do not involve a criminal intent. While the term confession is usually used in Criminal Court as denoting an acknowledgment of guilt. The accused in a criminal case may make admissions, just as a party in a civil case, i.e. by saying things inconsistent with the present points of proof. Admissions in the sense of inconsistencies are not peculiar to civil cases. *Greent Ev* 170. Admission in a civil suit that a document is genuine cannot in a forgery case be regarded as confession at all. *Per Rankin C.J.* in *Ambar Ali v Emperor* A.I.R. 1929 Cal. 539. "A confession," says Prof. *Wigmore* "is one species of admissions namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge." *Wigmore* § 1050, *Taylor Ev* § 724, *Steph Dig Art* a "species of admissions."

—A.I.R. 1927 Cal. 17. The admissions, it has not been defined in the Evidence Act. *Lal*, 6 A. 509 (539). But there is a distinction between an admission in the Evidence Act *R v Macdonald* 10 B.L.R. App. 21. *Empress v Jagrup* 7 A. 646, *Empress v Pandharinath*, 6 B. 34, *Empress v Meher Ali*, 15 C. 589, *Empress v Dabee Pershad*, 6 C. 530. *Empress v Nilmadhab*, 15 C. 595. A confession is only an

v Ram Chunder, 2 C. 341 (350) P C ; *See Dhiram v Narain*, 41 M L J 535. So also in admission in pleading cannot be dissected, and if it is made subject to a condition, it must either be accepted subject to that condition or not accepted at all. *Vidya'Ady Mullu v Mulji Hirani*, 19 C W N 713—19 II 399 ; *Sanatini Ali v Chint Bibber*, 9 W R 100, *Shank Surfuras v Seetha Dhunno*, 16 W R 257, *Jalwanth v Buda Kani*, 22 W R 220, *Niamullopiah Khilim v Himmu Ali*, 22 W R 519, *Pattu Behree v Watson*, 9 W R 190, *Baikanthi nath v Chintia Mohan*, 1 B I R (N C) 133 ; *Ishin v Hiran* 11 W R, 525 ; *Tanree v Darda* 15 W R 421, *Shank Shurfuras v Shank Dhunno* 16 W R 357

"The chief difficulty in the application of the rule lies in determining when statements are so connected to, either as to form a whole within the meaning of the rule. The matter does not depend on the statements being contained in one single document but on the nature and degree of connection between them ; and it may be said that the rule embraces these two propositions : () When a party's admission is so qualified or explained by some other statement made by him at the same time that the latter is in fairness necessary to present the true intention and meaning of the former, then the party is entitled, if his admission is given in evidence against him to have the qualifying statement put in evidence as a part of the admission () when the admission of a party refers expressly or by implication to some antecedent statement either of himself or his opponent or of any third person then the statement so incorporated or referred to forms a part of the whole admission within the meaning of the rule." *Wills Ev 2nd Ed* 159. This rule will not generally justify a party in insisting that separate letters or documents, or even distinct and separate parts of entries in one or more collections of documents, as letter-books, court rolls, etc., shall all be put in evidence by the party producing and reading any one of them unless they are on the face of them connected with the one already in evidence, and they seem to be the rule whether the documents be of a public or private nature. Where any such separate entries or distinct parts are favourable to the opposite party, he must put them in evidence as part of his own case. Thus, though the defendant is entitled to have the whole of a particular entry in an account book read, he cannot insist upon reading distinct entries in different parts of the book unconnected with the one read. *Cutt v Howard*, 3 Stark 6 ; *Remmie v Hall, Mannings*, N P Q Index 376 ; *Roscoe* N P 180. Where the plaintiff called for the production of the defendant's letter book, and read letters of the defendant from it, the defendant was not therefore permitted to read from it on his own behalf, other letters not referred to in the letters read by the plaintiff. *Stange v Buchanan*, 16 Ad & E 598, *Roscoe* N P 180. So also the answers of a party given in the course of conversation should not be proved against him without also giving in evidence the questions which drew forth these answers. *Pennell v Myer* 2 Moo & Rob 95, *Wills Ev 2nd Ed* 160. But this rule is not applicable where the party gives in evidence a statement made by his opponent in the course of conversation on some previous occasion. *Prince v Samo*, 7 A & E 634, *Wills Ev 2nd Ed*. Distinct matters, however, though relevant to the case cannot be introduced. *Davies v Morgan* 1 Cr & J 587.

This general principle, however, raises two sorts of questions, first whether the party offering the admissions must, as a preliminary condition put in the whole, or other parts, of the conversation, document, etc., secondly, whether the party whose statement it is may afterwards, by way of explanation, put in the remainder, or other parts, or other statements. It does not seem to be generally required that the party offering the admission must put in at the same time any more than that which he desires to use—whether a speech or conversation (*Eaton's Trial*, 23 How St Tr 1030, *R v Connell* 5 State Tr N S 1, 196) or a writing (*Corinth's Trial*, 11 How St Tr 423, *Sizer v Burt*, 4 Din, 426) ; and so far as the portion of it allowed to be given is concerned, the substance is sufficient, without precise words, whether of an oral statement or a lost writing (*R v Limond*, 1 State Tr N S 785, 820, *Hardy's Trial*, 24 How St Tr 681). For the party against whom the admission is offered, he may, by way of explanation, put in only so much as is necessary for his purpose, i.e., to qualify or explain the portion put in against him. *Price v Samon* 7 A & E 627. *Green's Ev* § 201. But the Court may believe a part and disregard the rest. The rule only requires that what is in favour of the party making the admission should be favourably and liberally considered and weighed with other evidence. Of

17. *Abbott C J in Queen's Case*, 2 B & B 287; *Thomson v Austin*, 2 Dougl & R 361; *Fletcher v Froggatt*, 2 C & P 566, *Cobbett v Grey*, 4 Ex R 729. So this is a well settled rule of law that the whole of a declaration or statement containing

Bholanath v Emperor 26 A L J 1331 = AIR 1929 All 1. In the United States the rule is thus laid down by Mr Justice Field in *Mutual Benefit Life Ins Co v Newton*, 11

which a party relies on to be taken as an admission with the qualifications which limit, modify

This rule, together with its reason, is thus

stated by Mr Best 'Where part of a document or statement is used as self-serving evidence against a party, he has a right to have the whole of it laid before the jury who may then consider and attach what weight they see fit to any self-serving statements it contains' Best § 520, see also *Berman v Woodbridge*, 2 Doug 788, per Lord Mansfield, *Smith v Blondev*, Ry & M 259, *Cray v Hall's*, cited in Ry & M 259, *White v Wier*, 11 W R 5610, see also *Sootan v Chand Bibee*, 9 W R 130, *Rajah Nilmoney v Rananagarh* 7 W R 29, *Shishu Shurufuraz v Shashu Dhunoo*, 16 W R 257, *Lallah Probhoo v Sheonath* W R 1864 Act 8 27, *Ishan v Haran* 11 W R 525, *Bata Jwa'a Das v Prant Das*, 34 C W V

Ind Cas 745 P C 'Where, taking the whole, the party is completely absolved,

agent before delivering it jotted down upon it with his master's authority a note on a counter-claim which the defendant had against the plaintiffs, and the plaintiffs sought to give the account alone in evidence as an admission of the amount of their claim it was held by Lord Mansfield C J. that the whole document must be taken together, since the defendant's statement was made "all in one breath" and he never admitted the account as distinct and independent from the counter-claim *Randle v Blackburn* 5 Taunt 245. So also if part of a letter is offered as evidence, other explanatory parts may be offered, if a party is sought to be charged or affected by a letter received in evidence, his reply thereto is admissible, and where one party uses as evidence a number of a series of the letters written by the other party, the letter may introduce the entire series *Burr Jones* § 294. It is a well established principle of law that if a plaintiff wishes to rest his case solely on the admission of the defendant, he must accept the admission as a whole. It is not open to him to pick out some part of it as may be favourable to him and neglect the rest *Syed Ismail v Hamids Begum*, 2 Pat L T 658. If a Court takes into consideration an admission in a deed to bind a party the whole of the statement therein should be considered. Admissions must be taken

though a party cannot by admission make a statement which is not true, and it is not to be used as an admission against him, taken even if they operate in his favour

41 M L J 525 = (1921) M. W. N. 639. An

admission must be deemed to be exhaustive. It must be read as it stands and it is not permissible to take one part of an admission and reject another part. *Bur Bahadur v Kaghbir*, 49 A 707 = 25 A L J 572 = 100 Ind Cas 1037 = AIR 1927 All 385. Ordinarily a Court is bound to take the whole of an admission, either, but a Court is not bound to give equal weight to all portions of it, *Rodha v Chunder Moner*, 9 W R 290, see also *Gowind Pershad v Chattrabhai*, 60 Ind Cas 138, *Shib Nath v Annada Prasad* 11 CL J 382, *Konwar Doregaiah*

v Ram Chunder, 2 C 341 (350) P C, *See Dharam v Narain*, 41 M L J 525. So also in admission in pleading cannot be dissected, and if it is made subject to a condition, it must either be accepted subject to that condition or not accepted at all. *Misbah Muller v Mulji Haris*, 19 C W N 713-19 B 399, *Sanatin Ali v Chait Bibee* 9 W R 100, *Sheik Sufiyyas v Seith Dhumoo*, 16 W R 257, *Jaloonath v Bussat Kant*, 22 W R 220, *Niamuttooosh Khilim v Hirmu Ali* 22 W R 519, *Pattu Beharee v Watson*, 9 W R 190, *Baskintha-nath v Chintra Mohan*, 1 B L R (N C) 131, *Lahin v Hiran* 11 W R 521, *Tarret v Durrani* 15 W R 421, *Shanth Shurfiyas v Shaikh Dhumoo* 16 W R 257.

"The chief difficulty in the application of the rule lies in determining when statements are so connected to, either as to form a whole within the meaning of the rule. The matter does not depend on the statements being contained in one single document but on the nature and degree of connection between them, and it may be said that the rule embraces these two propositions: (1) When a party's admission is so qualified or explained by some other statement made by him at the same time that the latter is in fairness necessary to present the true intention and meaning of the former, then the party is entitled, if his admission is given in evidence against him to have the qualifying statement put in evidence as a part of the admission. (2) when the admission of a party refers expressly or by implication to some antecedent statement either of himself or his opponent or of any third person then the statement so incorporated or referred to forms a part of the whole admission within the meaning of the rule." *Wills & Sons* 159. This rule will not generally justify a party in insisting that separate letters or documents, or even distinct and separate parts of entries in one or more collections of documents, as letter books, court rolls, etc., shall all be put in evidence by the party producing and reading any one of them unless they are on the face of them connected with the one already in evidence, and they seem to be the rule whether the documents be of a public or private nature. Where any such separate entries or distinct parts are favourable to the opposite party, he must put them in evidence as part of his own case. Thus, though the defendant is entitled to have the whole of a particular entry in an account book read, he cannot insist upon reading distinct entries in different parts of the book unconnected with the one read. *Catt v Howard*, 3 Stark 6, *Remmie v Hall, Manning*, N P Q Index 376; *Rosca* N P 180. Where the plaintiff called for the production of the defendant's letter book, and read letter of the defendant from it, the defendant was not therefore permitted to read from it on his own behalf, other letters not referred to in the letters read by the plaintiff. *Stargo v Buchanan*, 16 Ad & E 598, *Rosca* N P 180. So also the answers of a party given in the course of conversation should not be proved against him without also giving in evidence the questions which drew forth these answers. *Pennell v Myer* 2 Moo. & Rob 95, *Wills' Ev* 2nd Ed 160. But this rule is not applicable where the party gives in evidence a statement made by his opponent in the course of conversation on some previous occasion. *Prince v Samo*, 7 A & E 634, *Wills' Ev* 2nd Ed. Distinct matters, however, though relevant to the case cannot be introduced. *Davies v Morgan* 1 Cr & J 587.

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S. 17. course, the one offering admissions of this character is not bound by the statements which are favourable to the declarant. He may rebut such statements or show them to be erroneous. *Burr Jones Ev* § 293

Probative force. In treating of the probative force of admissions, it is necessary constantly to distinguish between those which are judicial and those which are extra judicial. The judicial admission is pre eminently a matter of procedure, under the direct control of the ad and the force and effect of an admission of this are determined by procedural rules on the other judicial admission is determined by logic. It is not assigned or established by a rule of procedure. Substantive Law goes no further in this connection than to determine that the existence of statement will be received as evidence of the fact asserted in it, either in an action at law or in a suit in equity. It will not, in this connection, be deemed material whether the extra judicial admissions were made before or after the suit was brought. They are rated entirely at their logical value. *Chamberlayne's Evidence* § 1236

Judicial and extra judicial contrasted in probative force. Logic may have its appropriate effect in case of the judicial admission when used as *probatio* rather than as *levamen probationis*. When used as proof, the more deliberate and, as it is said, solemn nature of the circumstances under which the judicial admission is made may confer upon it a probative force not characteristic of the average extra judicial admission. The former having been made in solemn form, in a court of justice constituting the foundation, or a part of the procedure in cases pending, in which the rights of the parties are stated, and by which the courts are called upon to pass judgment, and upon which they must solemnly decree the rights of the parties, are for those reasons entitled to greater consideration and weight than when casually or incautiously made, at a time and place, and under circumstances not calculated or intended to affect the rights or interests of others and, perhaps, unmindful of all the facts and circumstances of the case. *Chamberlayne's Ev* § 1236

Value and weight of extra judicial admissions. With all verbal admissions it may be observed that they ought to 1799 v
Lang 3 A & E 702, *Curtis v Hunt*, 1 C as it does in the mere reception of oration and mistake; the party himself either clearly expressed his own meaning or it frequently happens, also, that the wit of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. *Green* Ev § 200, *Taylor* § 561, *Earle v Picken*, 5 C & P 542 (n), *Re v Simons*, 6 C & P 540, *Williams v Williams*, 1 Hogg Consist 304, *Hope v Evans*, 1 Sm & M Ch 195. In a somewhat extended experience of jury trials, we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the party, and especially where they purport to have been made during the pendency of the action or after the parties were in a state of controversy. It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it, and in some instances it will appear that the witnesses depose to the statements of one party as coming from the other, and it is not very uncommon to find witnesses of the best intentions repeating the declarations of the party in his own favour as the fullest admissions of the utter falsity of his claim. When we reflect upon the inaccuracy of many witnesses in the original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transactions and the impossibility of recollecting the precise terms used by the party or of translating them by exact equivalents, we must conclude there is no substantial reliance upon this class of testimony. The fact, too, that in the final trial of open question of fact, both in character, in the majority of cases, is to distrust its reliability. *Greenleaf's Evidence*, 12th Ed. IA 74 (79). Oral admissions are careless in his mode of testifying, that he does not accurately remember the statements, that he is willing to misconstrue them, or that the declarant was

misinformed, or did not clearly express his own meaning. *A fortiori*, where the admission is that of one deceased, the caution should deepen into suspicion, for reasons that are obvious and without corroboration is of little value. *Burr Jones* Ex § 295. In *Kennedy v Murray*, 170 Mo 674 (Am), the Court said: "Evidence of such declarations, if true, is admissible, but it never amounts to direct

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as contradicted are in
Hence it is obvious :
upon the circumstances under which they were made as shown by the testimony, as well as upon the degree of accuracy and truthfulness with which they are related, *Burr Jones* § 295. But where the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature. *Rigg v Cargemen*, 2 Wills, 395, *Arcent Ex* § 200, *Taylor* § 861. In such a case it is neither weak evidence, nor does it require corroboration. *Commonwealth v. Galligan*, 113 Mass 202. On the other hand, when a confession is so proved, they may have great inherent force as evidence. *Disher v Fitchburg*, 22 Wis. 675.

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Mahomed, 65 l . . . Ind
Cas. 876, *Vir Singh v Marnam*, 1 Lib. 137-56 Ind Cas 191. A statement in a document should *prima facie* be accepted as true as against the explanation unless it can be shown by independent evidence to be false. *Ishad v Ali Kariman*, 22 C W. N 530-28 C L J 173-20 Bom L R 790 P. C. Unless admissions are contractual or unless they constitute an estoppel they are not conclusive, but are open to rebuttal or explanation, or they

were mistaken or were untrue, and is not estopped or concluded by them unless
her his condition. In such a case
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an, in re *Simpson*, 2 Ch D 72 at
p 89 and *Trinidad Asphaltic Company v Cornat*, (1896) A C 587 in effect
illustrate the same principle. *Ram v Chaudhuri*, 11 C W N 321 P C, *Gurish*
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party may confess
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admission can be withdrawn
Muhammat v Husain 26 C B
Pershad v Thakur Dei, 23 In
Cas 26-A I R 1928 Lah 75

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that a statement previously made by him relative to a certain fact is a false statement, he ought to be asked in re-examination by the prosecution or at any rate by the Court why he made a statement which was false. The mere fact that at the

sumption *Junnu Lal v. M.*
175 Ind Ca 1027=1924 Lab
they are found untrue B.

Emperor, 7 Lab L J 259=6 Lab 437=90 Ind Cas 145=A I R 1905 Lab 418. The admission of a wife in a divorce proceeding unsupported by corroborative proof should be received with utmost circumspection and caution *L. v. L* 108 Ind Cas 416 (F B), *Ovi v. Ovi*, 91 Ind Cas 20=49 B 367. If a person admits a right, it is necessary implication that he also admits the legal consequences of that right *Guru Charan v. Surendra Kri* 102 22 Ind Cas 670=19 C W N 363. Where a guardian is appointed to a minor for purposes of litigation in order to look after his interest any admission made by the minor against his own interest is waste paper *Parlati v. Dharmraj*, 32 Ind Cas 368. A statement made by a person in his own favour is inadmissible in evidence on his behalf *Naqina Singh v. Sander* 24 P W R 1916=33 Ind Cas 487. Title by law cannot pass by admission when the statute requires a deed *Mathura v. Ramkumar*, 23 C W N 370=43 C 790=23 C L J 26=35 Ind Cas 305, see also *Jadunath v. Pyral* 4 C L J 22 16 C L J 436; 22 C L J 380, *India v. Dina* 6 L W 147=(1917) M W N 583=41 Ind Cas 505, *Balkishan v. Aarun*, 13 N L R 121, *Jyoti v. Jagannath*, 29 O C 18=38 Ind Cas 605. A purchaser cannot be prejudiced by admission subsequently made to the debtor whose property has been sold.

does not bind the parties *Beni v. Dudha Nath* 27 C 156 P C=26 I 1=10 4 C W N 274, *Duar v. Fati* 26 C 250=3 C W N 222.

Admissions are always evidence against the party who makes them but

marriage is a question merely of adjective law. Its probative value must depend on the facts. *Latima v. M. Jhandi*, A I R 1927 Sindh 20.

account book is not sufficient to charge a person with liability still with regard to admissions the entries, regarded as the producer's own pecuniary interest the law dispenses with all proof save that the book has been kept by or under the authority of the producer *Mathilal v. Pr* 96 Ind Cas 429=A I R 1926 Mad 955.

ability. *Rest Lt* § 528. So it is, in general, immaterial to whom the admission is made. Thus, an admission made to a stranger is as receivable as one made to an opponent; though it is said that an admission, in order to support an account stated, must have been made to the creditor or his agent, and an acknowledgment of debt made to a third person, neither agent nor privy to the creditor, will not defeat the Statute of Limitations, since it is not evidence of a promise of which he could not take advantage. (*Rest Lt* § 528, 11 B. 1. 11).

Rest Lt, 17 W. R. 990; *Rest* § 1123; as are admissions made to himself in more solidary. (*Rest* § 510), *Phip* 1st Ed p. 191.

general, immaterial, *Rest Lt* 7th Ed of evidence,

between direct admissions and those which are incidental or made in some other connection or involved in the admission of some other fact. *Green* Lt § 141. Frequently letters of a party are competent purely as admissions, and because some inference may be drawn from them unfavourable to the claim or defence of the writer. *Burr Jones* 1v § 269, *Sisal* *Prosser* v *Monohur*, 23 W. R. 325. When letters of a party are in the nature of admissions, they are competent although written long before or after the commencement of the litigation, even though written to persons not parties to the litigation, on proof of their genuineness. *Burr Jones* 1v § 261. When letters are otherwise competent as admissions, they need not be signed or actually written by the party, provided they are sent by his direction. *Barlett* v *Mayo*, 33 Me 518. Except for the purpose of earlier reference, there would be no need to deal with other written admissions. The law is practically the same with regard to them as to letters, and is, that a

be used in a matter properly may relate to a matter

may relate to a matter memorandum written or authorized by a party may be offered as admissions against him like his oral statements. If self-serving in their character, it is immaterial in what form the document may appear. *Burr Jones* § 270. This rule has been applied to receipts (*Harrison* v *Remington Paper Co*, 140 Fed 385, (Am), 27), bills

Gadian of India, *acomber* Ill 535,

Paul (Am), Ill 535,

making the admission (*Edward* v *City of Watertown*, 59 Hun, 620), maps

(*Brigman* v *Jennings* 1 Ed Rum 734 *Huronath* v *Pico* 1v 7 W R 249,

Craven T R 48,

Doe v rsh (Ky)

238], cit *Van Vay*, Ald 606,

31 N J s in the

Graves, an action

books o

against its president (*Iney* v *Chadsey* 7 R J 224) *Burr Jones* 1v § 270

admissions, evidence against

41) and, of course, equally

make them, against the party

emalds 121 Cal 74 (Am).

of the defendant that the particulars contained in the entry were true. *Narain Coomar* v *Ramkrishna*, 5 C 861=6 C L R 286. Similarly partnership books

S. 17.

of the several partners and to be

tri

d

controversies between the members of the firm

each member *Daji ibaji v Gound* 10 Bom L R 111. It may be with knowledge and consent, although the presumption may be rebutted by proof that the partner or party or against whom the entries are offered, have not

had access to the books

incorrect *Burn Jones*

the defendant under ss

Goundan 17 M 131

in affidavits or in answers to interrogatories in the same or former proceedings are also competent *Phip* 4th Ed p 215, *Fleet v Perrius* L R 3 Q B 536, *Hanish v Prosunno* 22 W R 303; *Legal Remembrances v Motilal Ghose* 41 C 173, *Bhugwant v Lall Jha*, Marsh 48. Evidence given in Extra judicial proceedings by an accused person on his own behalf is an admission and is *prima facie* admissible. No particular formality is required to let it in as an

, 117 Ind Cas 50-29 Cr L J 962-1929 Sind 15

judicial admissions those contained in pleadings by reason not only of these presumed solemn contents, but with regard to the time at which they were made, their use in the action of which they form the basis, their use *dehors* that action, the chance of

imprint, in brief by the circumstances

not making them inadmissible

speak only from information and belief

in their pleadings, these pleadings may be offered in evidence

parties no admissions of the facts so alleged *Girish Chander v Shama Charn*

15 W R 437 *Austen v First* 2 G A App 91 (Am). A statement in the plaint

unchallenged and made by the plaintiff after his interest had been transferred

is in no way binding upon the transferee *Jahnomull v Saroda Prosal* 7 C

L J 604. The plaintiff may also rely upon the defendant's admission in the

Pleadings or Affidavits or Answers to Interrogatories *Tarinee v Duarka Nath* 15

W R 451, *Re Cohen* (1924) 2 Ch 515. But admissions contained in a state-

ment filed in plaintiff's name are not proof that they have been made by her,

Asmutloo v Alla Hafiz, 25 W R 125

to be evidence in plaintiff's favour

Radha Churn v Chunder Monee 9 W R

W R 519. But it does not bind his co-defendant *Lochman v Sansur*

395-A W N 1894, 138, *Azizullah Khan v Ahmad*, 7 A 353-A W N 1895,

54. So also admissions may be made in verified petitions *Girish v Shama*

15 W R 437, *Mohun v Chitto*, 21 W R 24, *Gour v Mohesh* 14 W R 451

An admission in a

1. An admission in

14 B L R App

(1893) 1 Ch 84

Akhoy, 19 C L J
Bibee v Achmal
J 188; *Pe Hoyle*

Conditions of Admissibility—Statement must be one of fact. The extra judicial statement of

as would apply to the

of all essential that

be one of fact: *ex affir*

While inference is a

admission may be a psychological one, *ex q*, belief *Ibid*

Admission on Matter of Law. Parties cannot by their admissions of law

be bound to offer to the court to adopt their view

1

from certain facts, his 'opinion' as it is frequently called are not admissible for an admission except in cases where the declarant might, if present as a witness, have testified to the same inference or conclusion *Chamberlain's Ex*

§ 1293 An admission on
v. Sunler, A I R 1924 1 S.
 Nag 311; *R v. Furtie*, 81
 13 Cox 173; *R v. Lane*.
 I. R. 1923 Lab 779-113 Ind Cus 99; A I R. 1927 Lab 234; A I R 1926
 Outh 341, 92 Ind Cus 732 An erroneous admission by a counsel on a point
 of law is of no effect and does not preclude the party from claiming his legal
 rights in the App Hu 27 C L J
 147-15 Ind Cus 953; 109-1 A
 Sup 17; *Hem Parshil* *Johnston*,
 12 Hark (59 Gen) 155, *Asraf*
 14, 7 C L J 152; *Ramaram v. Khikham*, 11 C W N 310 So also an
 erroneous admission of the pleader of a party on a point of law cannot bind the
 party, *Dicir Bux v. Fakh* 3 C W N 222, see also *Kishori v. Rajmal*, 24 B
 360, *Narayan v. Venkta*, 29 B 403

Statements made under constraint or duress In regard to admissions
 made under circumstances of constraint, a distinction is taken between civil and
 criminal cases, and it has been considered, that on the trial of civil actions,
 admissions are receivable in evidence, provided the compulsion under which they
 are given is legal and the party was not imposed upon or under duress. Thus,
 in the trial of *Collector v. Lord Keith*, 11 sp 212, the testimony of the defendant,
 in which he admitted the

vindicate his conduct. In that case *Le Blanc J.*, remarked that the manner in
 utter of observation to the jury,
 issue, he was bound to receive
las v. Ramlabanya, 106 P R
 extends also to answers volun-
 tarily given to the cross-examination asked, and to which the witness might
 successfully have objected. So the voluntary answers of a bankrupt before the
 commissioners are evidence in a subsequent action against the party himself,
 he whole examination was
 obtained by imposition
 led by *Lord Ellenborough*
 When such admissions
Stoddard v. De Fastel,

4 Camp 11, *Robson v. Alexander*, 1 M & P 118

Erroneous admission An erroneous admission may be withdrawn *Sita*
Ram v. Pir Baksh, A I R 1931 Lab 6, see also A I R 1923 All 575, A I R
 1928 Lab 726; 77 Ind Cus 875, 65 Ind Cus 368

Statement must be certain An admission must be certain, and consistent,
 definite and clearly proved. It must, in addition, be couched in language reason-
 ably capable, without forced or strained construction, to bear the interpretation
 placed on it. While conjectural and suppositious statements are excluded
 absolute precision is not demanded in case of a declaration offered as an admis-
 sion. A statement is not inadmissible because of a possibility of ambiguity
Chamberlayne's Lr 1295 A vague admission is not enough 83 Ind. Cus
 904-21 A L J 869

Statement must be voluntary It is further required: not only that the
 statement should be one of fact but that it should have been voluntarily made
 by the declarant. A distinction should, upon principle, be drawn between the
 admission obtained by the use of duress, where the will is overpowered or con-
 trolled and

the bare custody of an officer is not sufficient to exclude a statement otherwise

S. 18 voluntary. Nor is it ground for rejecting the statement as not voluntary that it was given by the declarant as a witness in response to compulsory process whether in Court, before arbitrators, commissioners in bankruptcy, or in other judicial proceedings. As the only important matter is the fact that the declaration was made by a party, the circumstances under which he made it are of little regard as unimportant provided he knew what he was doing and desired to do it. *Chamberlayne's Li* § 1294

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions

Statements made by parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character

Statements made by—

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements

Prima facie

Admission attaches primarily if not exclusively to a statement of fact, to its constituent quality in relation rather than to the relation existing between the statement and the fact. A statement competent as an admission may in many cases, be one in an independently relevant rather than an assertory capacity. Thus the offer of one accused of crime to plead guilty under certain conditions while receivable against the declarant, is plainly not within the operation of the Hearsay rule. Admission of this type are perhaps more

pre-eminently those of course, however, being made by the party as belonging to the person making them and they are offered in evidence by persons not parties to the suit, the admissibility of statements against the interest of the party

utterance, when made thus represents the party's own belief (*Vide* s 20). By adoption, the party may assent to a statement already uttered by another person, which thus becomes effectively the party's own admission. By privity of interest and by agency the party's rights may in the substantive law be affected by the acts of another person and thus the other person's admissions may equally be available evidentially. *Wignmore* § 1070. In order that an admission may be who made it had one interest of section 18 of the Evidence Act 711; see also *Ma Sheng v Mann* 17, 5 W R 268

A general Procedural Requirement From the historical point of view, it seems clear that the practical development of the subject of admissions was materially affected by the existence of procedural rules now practically obsolete. These forbade a party to call his antagonist as a witness and thus confined a proponent, as to facts within the latter's knowledge, to such statements as he may have made with regard to them. But an earlier and more potent formative influence, whether the admissions were judicial or extra-judicial, has been that it demands good faith the Courts should. It is prescribed for his story. It punishes a party who attempts to deceive the Court by false The same principle en to talk about a *Darby v Ouseley*, = held to explain any statements he may have made in the matter *Chamberlayne's Ex* § 1234

Scope of the section This section deals with admissions in general. The

R 434 "No to a suit. The th admissions made by nominal parties, e.g., consignees suing in the name of consignor. When the Court considers the admission of such a party fraudulent, it should be rejected at once. See notes to *Banerman v Radinuss*, 3 Sm L C 363" *Not Ex* 143 Admissions under this section are only evidence against the persons

S. 18. making them. Under section 32, *infra*, the admissions there enumerated are evidence against all the world

In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were jointly interested or one was *derminately* interested through the other; and a mere community of interest will not be sufficient. Thus, where two persons were in partnership and an action made by the only of co part

Rau storne v Grandell, 15 M & W 304 *Phillips v Elaget*, 11 M & W 84 So, of the contractors, nothing bind the personal represent

23; *Fordham v Hallis* 10 sions of the executor bind the survivor *Seater v Lawson*, 4 B & Ad 350, *Hathaway v Haskel*, 9 Pick 24 Neither will the admissions of one tenant in common is receivable against his co tenant, though both are parties on the same side of the suit *Dan v Brown*, 4 Cowen 183 (192), *Faylor* § 751

Where a party sues in a representative capacity—i.e. as trustee executor, administrator and only a statements admission in his personal representative (ad item begins to end with the litigation, and consequently his extra judicial admissions are not receivable at all *Wignore* § 107, citing *Pindell v Rubens*, 115 Atl 859; *Stevens v Continental*, 97 N W 862; *Carpman v R Co*, 12 Utah (Am)

Where procedure still the real and beneficial

action I am t for the interest, and his statements cannot be received as admissions of the corporation *Wignore* § 107 But a contrary view was early taken in England for parish inhabitants *R v Hardwicke*, 11 East 578, 555

Sub clause (2) is the converse of sub-clause (1) There the statement was that of the representative; here it is of the party through whom he derives his right to sue Thus, if an executor were to sue for a debt, the declaration of his testator that the debt was paid would be evidence against him *Pocock v Billings*, 1 R & M 227; *Smith v Smith*, 3 Bing N. C 29 In the same way the declaration of the ancestor respecting his title to the land held by him in evidence against the heir (*Doe v Pettet*, 5 B & A 229), and the declarations of the former owner of goods that he had sold them have been admitted against the lord of the manor who claimed them as heriot *Lat v Finch*, 1 Taunt, 141, *Nort Ey* 148

Statements made by a party to the action have been stated

affected by his admissions the substantial rights of one for whom he is acting

other words, in all these relations, substantive interest rather than form of record is regarded as the determining factor. One who is to receive the fruits of successful litigation procedure holds himself responsible for his statements in connection with its subject-matter. *Chamberlayne's Ev* § 1311. In the Court of Chancery, in England, evidences are not received of admissions or declarations of the parties, which are

S.

For example, the admission. In an action by A against X for prosecuting a suit contrary to an agreement, to prove the prosecution of the suit by X, A offered admissions by X of the obtaining of the judgment and issue of execution. They were objected to, on the ground that they were not the best evidence, and that a certified copy of the judgment should be produced.

In *Smith v* case of the admissions. The admission belongs to parol evidence from other sources. A party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record. Thus the statements of a party that certain land belongs to him, or that he is the owner of a deed, or that he admits against himself may reasonably be taken to be true. A statement made by defendant in another suit may be used as an admission within the meaning of this section. *Hirish v Prosser*, 22 W R 363; *Mohun v Chuttoo*, 21 W R 34; *Lala v Dighambar*, 22 W R 304 N; *Forbes v Mahomed*, 11 W R 28 P C,

its simplest form when the admissions are made by one who is a party to the record and who is also a real party

if he made the statement. When the statement proven is between the parties to the transaction it has always been the rule that one party could prove the

S. 18. making them Under section 32, *infra*, the admissions there enumerated are evidence against all the world

In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which he is directly interested or one was *dermatinely* interested through some other person of interest will not be sufficient. Thus, in *Wigmore* § 107, citing *Pendell v. Gubens*, 115 Atl 859; *Stevens v. Continental*, 97 N W 862; *Chipman v. R. Co.*, 12 Utah 8 (Am) and an action was brought against them as partners of a vessel, and admission made by the one, as to a matter which was not a subject of co-partnership, but

admission as executor or the like would not be receivable against them as representative in his personal capacity. A guardian so far as his powers place him in a representative capacity is subject to the same rules, but the function of a guardian ad litem begins to end with the litigation, and consequently his extra judicial admissions are not receivable at all. *Wigmore* § 107, citing *Pendell v. Gubens*, 115 Atl 859; *Stevens v. Continental*, 97 N W 862; *Chipman v. R. Co.*, 12 Utah 8 (Am)

Where procedure still permits as the real and beneficial party in

not that the declarations of the real

Smith v. Lyon, 3 Cramp 455, which of the owner on a charter contract. *Ellenborough L. C. J.* said "Although action is in the name of the master it is brought for the benefit of the owner, I am therefore of opinion that anything said by the latter is admissible evidence for the defendant." A share holder of a company is not the real party in legal interest, and his statements cannot be received as admissions of the corporation taken in England for

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that of the representative, here it is of the party through whom he derives his right to sue. Thus, if an executor were to sue for a debt, the declaration of the party against whom he sues must be taken from the party against whom he sues. *Proctor v. Proctor*, 29 In the same land held by him the declarations of the former owner of goods that he had sold them have been admitted against the lord of the manor who claimed them as heriot. *Ivatt v. Finch*, 1 Taunt. 141, *Nort. Ev* 148

has no beneficial interest in the issue of the litigation will not be permitted to affect by his admissions the substantial rights of one for whom he is acting

the previous assignment. *Henson v. Wild*, 2 Camp. 651. *Green Ev* § 172. S. 1
 "The modern prac
 has no interest in
 prejudice of
Bumstead, 99
 party is even 1
L. C. & D. Ry
Payne v. Rogers, Doug. 107.

A nominal party may be affected by the admission of a real party, who
 though not named in the record, has a substantial interest in the result. *Falcon*
v. Famous Players, (1926) 2 K B 171; *Leil v. Insly*, 16 East 113.

Seip fact
 to do law
 8 Scott. N. R. 830 I in
 authority to make such contract or a larger authority to make all falling within
 the class or description to which it belongs, or a general authority to make any;
 a relation existed between the parties
 for instance, that of partners, by which
 by law the agent of the other for all
 particular partnership whether general
 or special, or usually belonging to it, or the relation of husband and wife, in
 considers the husband to make his

agency may be created

in quoad hoc, precisely the same as a real authority given by the defendant to the
 agent. This representation may be made directly to the plaintiff, or made
 publicly, so that it may be inferred to have reached him and may be made by

of the case, as expressly or impliedly authorised by him to make them' leave it
 open to the Courts to deal with each case that arises upon its own merits
Field p. 44

The principal constitutes the agent his representative, in the transaction of
 certain business, whatever therefore, the agent does, in the lawful prosecution
 of that business, is the act of the principal whom he represents *Green Ev* §

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S. 18.

as his mere instrument. So whatever contract for his principal or at the time, any act, within the scope of his authority, and in the course of a particular contract or transaction in which he is then engaged, is in legal effect, and by his principal, and admissible in evidence not merely because it is a declaration that being made at the time is treated as the declaration the *res gestae*, a part of the act, if in fact made by himself on his own authority, and not accompanying the making of a contract or the doing of an act, in behalf of the transaction to which they relate. A part of the *res gestae* and general rule of law, excludes statement by an agent of what is not a part of the transaction.

The declarations by agents are original evidence and not hearsay, being regarded as verbal acts, they are receivable in evidence without calling the agent himself to prove them. *Doe v. Hawkins*, 2 Q. B. 212; *Tay* § 602. They are the ultimate facts to be proved and not an admission of some other fact, and the only question is whether the declarations were made and relied upon. It often happens, however, that the declarations of an agent are admissible as part of the *res gestae* and that they form no part of any contract and contain no element of estoppel in which cases they are of course, open to explanation or may be shown to be incorrect, like admissions in general. *Burr Jones* § 22. The admission of an agent that he purchased as agent is evidence that the purchase was made by him in that capacity and not on his own account. *Goreebollah v. M. R. G. D. Boyd* 2 W. R. 10, see also *Mohesh Lal v. Basant*, 6 C. 340 (352), *Gorindj v. Chhotu*, 2 Bom. L. R. 651; *Parameswara v. Tijaithen*, 20 Ind. Cas. 637.

Admission by agent—When receivable. The admission of an agent can not always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him, but the admission or declaration of his agent binds him only when it is made during the transaction.

§ 1078. The b

in *Fairlie v.*
in 1788 had set

some time before the true principle was defined and accepted. *Ibid*, 100.
(1) As the case of *Fairlie v. Hastings*, 10 Ves. 123 (1804) is of some importance as well as of interest the judgment of Sir William Grant, Master of the Rolls is given in extenso. "The subject of this cause is a loan of money by the late plaintiff, Maharajah Nabokissen to the defendant Warren Hastings. As it is not by bill in equity that money lent is to be recovered, it is incumbent upon the Court for

sum by instalments; that a bond remain with a Cauntloo Baboo, an agent should be advanced, and then should

never received the bond, *Cauntloo Baboo* in *S.*
 real, and could not read any part
 evidence of declaration by *Gobind*
 is whether these declarations are
 the bill. Upon that question my opinion is, that these declarations do not come
 within the principle upon which they are supposed to be admissible. As a
 general proposition, what one man says, not upon oath, cannot be evidence
 against another man. The exception must arise out of some peculiarity of
 agent may, un-
 his agreement,
 be what consti-
 tutes the agreement of the principal, or the representations or statements may
 be the foundation of or the inducement to, the agreement. Therefore, if writing
 is not necessary by law, evidence must be admitted to prove that the agent did
 with regard to acts done, the words
 uently tend to determine their quality
 must be affected by the words. But
 except in one or the other of those ways, I do not know how what is said by an
 agent can be evidence against his principal. The mere assertion of a fact cannot
 amount to proof of it, though it may have some relation to the business in which
 the person making that assertion was employed as agent. For instance, if it
 was a material fact that there was the bond of the defendant in the hands of
Cauntloo Baboo, that fact would not be proved by the assertion that *Gobind*
Baboo supposing him an agent, had said there was for that is no fact,
 that is, no part of any agreement which *Gobind Baboo*, is making, or of
 any statement he is making, is inducement to an agreement. It is mere
 narration, communication to the witness in the court of conversation, and
 therefore
 dismissed
Loughborn
 agent to B, whatever A does
 agent of B, is admissible
 which he makes for B, and
 the agent's account of what

also *Kahl v.*
 C 335
 a penalty for selling short measures a witness was proceeding to state what was
 said to him by one *Peely* who managed the defendant's business, as to a sale
 about to take place. *Lord Ellenborough* admitted the evidence saying "Peely
 ness, what he
 t, or on another
 said respecting
 a sale of coals, then about to take place and respecting the deposition of the
 in the course of
 affect his master"
Railway Company
 master to a Police
 ys servants, were
 received as admissions against the company, the station master being the proper
 agent to make such statements. *Ibid* In that case *Cockburn C J* said "I

Archibald J said "Being in charge of the station at the time a felony was
 committed, it was his duty to put the police in motion. That being so, I think
 he was acting within the scope of his duty, that he had power to bind the

S. 18. company, and therefore that it scarcely a case of "cause of employment" master may be responsible in him, if done in the course of employment. But in contract, and as regards admission, *Cockle Cas* 177 In *Peto* expression "course of employment" the scope of authority of an agent. But to be within the scope of authority, the statement must apparently be made in the course of employment. *Cockle Cas* 173

Where an agent, acting within the scope of his authority, wrote to his principal, non-*est* on their account, and they replied, it was held that the agent's statement was binding on the principal. *Coates v. Dainbrell*, 5 Bing 58, *Powell*, 438. So the declarations of an agent bind the principal only so far as the agent had authority to make them. *Faussett v. Faussett*, 7 Ecc & Mar Cas 93 95, *Hogg v. Garrett* 12 Ir Eq R 559. If goods were deposited with a pawnbroker in the ordinary course of business, a declaration of the shopman that his master had received the goods would probably be admissible against his master, because it might be assumed that the shopman was authorized to answer in them, but it is not admissible in a summary business of a hundred pounds. *Garratt v. Howard*, 1 C R 127. In the former case *Tindal J* said: "It is dangerous to open the door to declaration by agents beyond what the cases have already done. The declaration itself is evidence not given upon oath; it is made in his absence, when he has no opportunity of any answer or any cross-examination."

trial at a certain station in the course of which the night inspector said:

after the transaction *G. O. Ry. Co v. Mills*, 34 L J C P. 190 = 15 C 15 S 748. In rejecting the evidence *Earle C J* said: "I am of opinion that this admission is inadmissible."

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principal
form p

it will be rejected as will properly within the scope when the agent's right to principal can no longer be

business and in the ordinary course to past or present events (Pratt) if the transaction or business is subsequent admissions regarding

Faulstich v. Haslam, 11 Q B 310. So *Earle v. Alcott*, 4 Taunt 58, 59, 60. *Stockton v. Demuth*, 10 Mees & W 58, 59, 60. *Wiggin v. Vignath*, 10 Mees & W 58, 59, 60. *Wiggin v. Vignath*, 10 Mees & W 58, 59, 60. *Wiggin v. Vignath*, 10 Mees & W 58, 59, 60.

not by the declarations themselves even when accompanied by acts purporting to be acts of agency. *Montgomery v Leith*, 162 Al. 216 (Am). Unless and until the agency is so proved and the declarations, acts or admissions of the agent come within the rule laid down, the evidence is not admissible. Such proof need not be invariably introduced in the first instance, the order of proof being within the discretion of the Court. *Burr Jones* § 255; see also *Chamberlayne's Fe.* §§ 1333, 1339, *Emperor v. Rulbaram*, 19 Cr. L. J. 789. Declarations and acts are competent to prove agency if there is proof of former similar acts or declarations recognized or approved by the principal. *Burr Jones* § 255. Agency may also be proved by proving that the agent has acquired credit by acting in that capacity and that he has been recognized by the principal in other instances of a similar character to that in question. In *Watkins v Venee*, 2 Stark, 368, a guarantee signed by a son for his father was admitted as evidence upon three or four occasions. *House*, 1 Camp. *Whitefield v Brand*, 10 the general agent, *Ram Dinksh v Ashori Mohan*, 3 B L R A C J 273.

Agency may be either general or special, and it may be express as when it

and be an equivalent to an original authority; *Omnis ratihabito retrotrahitur et mandato priori equibatur* (A subsequent ratification has a retrospective effect and is equivalent to prior command) So, where A and B were jointly interested in a quantity of oil, which A contracted to sell without B's authority, and B at first assented to the agreement on hearing of it, but afterwards made the contract binding upon him. The point to be regarded in this clause is no agency, as to which the Court must be satisfied, but that there was authority given sufficient to cover the particular statements relied on as admissions. Though the maxim is *qui facit per alium facit per se*, the identity ceases where the agent exceeds the scope of his authority, and his admissions in such a case will not bind his principal. *Nort* E 144.

infant because an

under agreement to make a new contract for the future occupation of it, will be impliedly authorised to make it. *Fateh v Baldeo*, 5 O W N 155=A I R 1928 Oudh 233

S. 18.

19 Pick (Mass U S) But the opinion or conclusion of an agent is not binding on his principal unless it is in his behalf and are not admitted but is admitted but is not admitted to make a principal Burr upon the personal action, inference is of acknowledgment Limitation Act

(IX of 1908)

Evidence in Primary Admissions by an agent have the same quality of primary proof which characterizes other admissions. The declaration is equally competent though the declarant be in Court and available as a witness. The evidence furnished by the fact of an admission is primary. So also, the statement continues competent after the death of the principal, if made by the agent before that event. It is entirely unaffected by the death of the agent. *Chatterjee v. L. S. 1343*

Agents
 tions, which
 latter will on
 them (a) in
 tion, or (b) in pursuance of an authority to make statements or reports as to matters affecting his principal's business or interests; or (c) in the due execution of a general authority to carry on the business of his principal or a particular department of it with full discretion and powers of management. *Hills v. E. 163*. So a letter written by the secretary of a company by order of the acting directors, stating the number of shares held by M was admitted on behalf of his executors in proceedings against them. *Meux's Executors Case 2 D M & G 222*, see also *Natural Exchange Company v. L. 1862*, at a general meeting made by the chairman. *Roscoe N P 70* in rejecting the admission of the chairman in *Fry J said*

his agency. If that were so the statement would be admissible. *See also*

So also the secretary of a projected company has not by any power to bind the members of the provisional committee by admission. *Burnside v. Dayrell, 3 Exch 225*. In *Bruff v. Gl. N. Ray Co, 1 F & F 11* *Hills J* rejected an admission of the secretary of a company as to the receipt of a letter. And an admission by the board meeting of a company registered consisting of a less number of directors than was required by the deed of settlement was rejected in *Ridley v. Plymouth Banking Co 2 Exch 711*. Admissions by servants of a company, in

dants in action to
 to who was responsible
 ene l, when made at the use of
 tent, against the company,

on the ground that his employment did not carry with it authority to make declarations or admissions at a suit performed his duty; and that which the injuries arose and was then engaged, but that it was a mere narration of past occurrence. But as has already been pointed out, that there is a class of cases in which the

S. 1

business, are made
Kirkstall
his, 18 C.
v. London
ramuay Co, 27 L. T. 193; *Mauheir v Nelson & Co & P* 58; *Loughboro*
389. But in
the agent's
Jo. *Widdent*

So in every case the question invariably by the agent in the scope of his authority or, as it is sometimes put, in the time of his duty? If so, it is admissible against the corporation. The declarations

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by him. *Durr Jones Ex. § 357.*

contracts, give receipts, compromise
business, *Kishan v Har*, 39 I. A.
V N 321 He can maintain suit on
as and can receive payments and

Ramkrishna, 15 Bom L
v. *Ram*, 35 A 380; *Sarkar*

- S. 18. the transaction was really for the benefit of the family, he can not rely upon an acknowledgment of the liability, made by one of them as an acknowledgment duly made on behalf of all of

adult co-parceners under special circumstances, bind the other
suami v Krishner
 is also not open
 make an acknowledgment
 those who claim through the person acknowledging *Ram Kishan v Hardilal*
 71 Ind. Cas 737 = 1923 Lrb 135

against the employer? Because
 made in performance of any work
 been asked by a brakeman when
 point, and had then mentioned receiving certain instructions from the
 despatcher, this statement might be regarded as made in the course of performing
 his appointed work. *Wigmore* § 1078.

Admission by agents in criminal cases. The rules of admissibility are in
 general the same for the trial of civil and of criminal causes. Not only in
 practice, but in principle and in spirit there is no occasion for a distinction
 18 Cox 460,

upon the division of opinions whether under the circumstances or not
 the testimony of *Captain Coit* to the facts stated in the record, was admissi-
 ble. That testimony was to the following effect That he, *Captain Coit*
 was at *St. Thomas* while the *General Winder* was at that island, in September
 1924 and was frequently on board the vessel at that time, that *Captain*

of the authority of the master, the nature of the fittings, and the way

accomplishment of the voyage, being thus laid, the testimony of *Captain Coit* was offered as confirmatory of the proof, and properly admissible against the defendant. It was objected to, and now stands upon the objection before us. The argument is, that the testimony is not admissible, because, in criminal cases, the

S.

force of the argument. In general, the rules of evidence in civil and criminal cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must be shown that the agent has the authority, and that the act is within its scope; but these being conceded or

be con-
poison.
itive or
circumstantial, but this is matter for the consideration of the jury and not of the legal competency. So, in the cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to or command what is done by any other in furtherance of
master was just as
the purview of the

The evidence here offered was not the mere declarations of the master upon other occasions totally disconnected with the objects of the voyage. These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprises. He
y for the
Captain
ons were
all made with reference to that object, and as persuasive to the undertaking

he is; and
principal
they had

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criminal, as
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agent, then it

5. 18. as where the agent is dead, which can be produced decided that a receipt given by the agent is the best evidence of the fact.

proved in the other, each particular fact is to be proved by its own evidence." Mr Plumer on the opposite side: "I desire it may be distinctly stated that the rules of evidence are the same in all cases."

between the agent and or said by the other; Chancellor Erskine in admitting the proof must advance cases, for a fact must be followed by a criminal

is admissible

the statement of his servant, the strictly proved. It is not sufficient to say that because a man is another to the third the former is a servant of the latter. *Rubram v. Emerson*, 46 Ind. Cas 709-4 P L W. 120-19 Cr L J 789

Admission by wife. The admission of the wife will bind the husband only where she has authority to make them. *Emerson v. Blomden*, 1 Esp 142, *Anderson v. Sanderson*, 2 Stark, 204. *Case v. Anderson*, 4 Campb. 92. This authority does not result, by operation of law, from the fact that the wife is a servant of the husband; but is a question of fact, to be

inference of with great

Greenl. Ev § 165, *Gregory v. Porter*, 1 Campb 455, *Riley v. Snyder*, 4 Barb 222, *Paethrop v. Furnish*, 3 Esp 142, *M 422*, *Riley v. Snyder*, 4 Barb 222, *Paethrop v. Furnish*, 3 Esp 142. Where a wife is authorised to manage business of her husband, during his absence, her admission is evidence against her husband. *Clifford v. Burton*, 10 Q B 190. The law on this subject is that laid down by *Alderson B* in *Case v. Anderson*, 4 Campb 92. The law is that the admission of the wife cannot bind her husband by her

may be his agent to make admissions with respect to matters connected with the trade." A wife's admission has been rejected to prove a slander by her husband *Tait v. Dwyer*, (1905) 2 Ir R 525. An admission of a daughter is not binding on the father, *Buchan v. Lister*, 2 Agg 20.

Admissions by Pleaders, Attorneys and Counsels A vikal in this country has not ordinarily any greater power to bind his client than that which is possessed by an attorney in England. *Wooltrotte Ex 237, Prem Sukh v Parthie*

has authority to act as agent in as it is to be implied from the mere been enlarged in the particular case, extends only to the management of the cause. Yet, conversely, all his admissions during the management, including utterances in the pleadings do affect the client. Higmore § 1063 "The attorney is not the agent of the client for the purpose of making admissions, except in the cause and for the purpose of the cause. All that appeared here was that one of the plaintiff's witnesses

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evidence in the case *Young v Wright*, 1 Camp 139, *Petch v Lyon*, 9 Q B 147 (1854). The reason for this distinction is found in the nature and extent of the duty for the management of the property. See also *Parkins v Hawkshaw*, 10 Q B 100, *Alston v Turner*, 10 Q B 398. If the admission is made, it appears that the attorney was liable. See *Cliff*, 1 Camp 133, *Ellis v Bisheswar*, 5 P 777 = 1927.

Pat 61 But in *Wagstaff v Wilson*, 4 B & Ad 339 a letter threatening legal proceedings, but written before action begun, was excluded See also, *Doe v Richards*, 2 C & K 216 So in the absence of any retainer at that time in the case the admissions ss 185; *Burghart* 34 *Green v* § If an attorney herein binds the hands 2 B & Ad

845, 855; *Standage v Greighton*, 5 C & P 406, *Taylor v Foster*, 3 C & P 19, *Griffiths v Williams* 1 T R 710, *Frusolte v Burton*, 9 Moore 64, *Lord Owen & Co v Wood*, 120 In 303 (Am)

wards be withdrawn." Taylor § 783 citing *Hart, v. Coudon Union, per Ct.* of here there was no
counsel in the
N 82, Mr. Justice
to conduct his

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Venkata
v Minis
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see also *Sen v Chunn Lal*, 51 C 385, *Ashtaran Muthu*, 105 Ind Cas 5. A counsel's authority is less extensive than that of a solicitor *Richardson v Peto*, 1 M & G 806, *R v Greenwich* 15 C 2. *Gaya*, 1923 (Pat) 307. It is not binding on the

to bind his client by 466, but see *Bansi Lal v. Emperor*, 30 Bom L. R 646-A 1 R 1928 Bom 241. If a plaintiff relies upon any statement by the defendant or his pleader made in a previous litigation between the parties, that statement must regularly proved. On proof of such statement the question arises as to its weight to be attached to it. *Mam Lal v Uma Charan*, 19 C L J 541. A judgment deliberately recording the admission of a pleader must be presumed to be correct, unless contradicted by an affidavit, or the Judge's admission that the record was wrong. *Ilu Dyal v Hura Lal*, 16 W R 107.

Oral testimony on behalf of a litigant in a litigation with B on the footing of a admitted as evidence against him in a litigation with B on the footing of a not strictly in it, although any subsequent. *British Insulate* Co v *Jo* 252-156 L T Jo 440. *Per Russel J* affirmed an appeal in (1924) 2 Ch 160-93 L J Ch 467-131 L T 683.

Partners and joint contractors. 1. virtue of

ner concerning partnership affairs by this Act is evidence against the member. By the act of Er

1 Taunt 104; *Pethering v Turner*, 1 Taunt 104, *R v Hardwick*, 11 East 589, *Fox v Chpton*, 6 Bing 792, *Nicholls v Dowding*, 1 Stark, R. 81; *Lucas v De la Cour*, 1 M & S 249; *Whitcomb v Whithung*, 1 S L C 44-9 Doug, 622. *Kals v Gope*, 2 C W N 166, 189. Partners and joint contractors making admissions against or joint contract 588 (591) in the admissions admissible 281 (Am); 1 who are partners, one of them, within his share within the share partners have been observed made during

action, are admissible against both; and entries in the partnership books made by a partner during the continuance of partnership are admissible against both. Admissions of one partner are admissible against all to prove the execu-

tion admissible. Although one admission may be received, without question of credibility." *Burr* received against another on the same ground that they are

business and within the scope

Koersulaiah v. Mukta, 11 C. 528 (591), *Steph Dig Et* art 17; *Re Wintely*, (1891) 1 Ch 593; *Catha v. Jhoro*, 39 C. 995. While the firm thus created exists, it speaks and acts only by the several members; and of course when the existence ceases by dissolution of the firm the act of an individual member ceases to have the effect

as by the agreement. *Bel.*

v. Braddick, 1

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the statement made during the existence of the partnership, it is undoubtedly binding on and evidence against the other members of the firm. *Burr Jones* § 248. In *Wood v. Braddick*, 1 Taunt, 104 (1803) which was an action brought to recover from the defendant the sale proceeds of certain linens, which the bankrupts, in the year 1796, had consigned for sale to America, as the plaintiffs alleged, to the defendant jointly with one Cox, who was then his partner, but, as the defendant contended, to Cox only, the plaintiff produced a letter from Cox, dated 24th June, 1804, stating a balance of £919 to be then due to the bankrupts upon this consignment. It was in proof that on the 30th of July 1802, *Braddick* and Cox dissolved their partnership, as from the 17th of November, 1800 *Cochett* and *Lens Serjts*, objected that this letter, being written after the dissolution of the partnership, was not admissible evidence to charge *Braddick*. In rejecting the contention *Mansfield C J* said "Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred

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t principle is it
joint contract
one person in
regard to past
last exception
1841 191, 199,

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S. 18. others, admissions made by the signatory at a time other than the execution of the contract were held inadmissible *Tuft v Church*, 162 Mass 527 (1m) And where one partner after having given a note in his own name said it was for the partnership in *Smith, 21 Wind* (" partnership, that for the rest, in con that relationship for himself in sum goods, either of t into the same business, at the same place, on his own account. The legal presumption is, when a person purchases a thing, he purchases it for himself. In such case, the vendor, in order to charge another person as a partner, must show the purchase was made for the firm or that it went to their use. So where a member of a partnership bought a mule, ostensibly for himself, and when it was sent home he said it was for the firm, his declaration so made after the purchase was not of itself competent to bind them. It is a general rule of the law of evidence that the against all the rest, evidence is admis

received when the rule of interest in the cause excluded the witness" *Burr*

all the partners, and kept more or less also generally be received as *prima facie* evidence *inter se* *Gething v Keighley*, 9 Ch D 547, 551; *Lindley on Partnership* p 566 *Days* " *Guth v Brown* 10 Bm L R 310 In *Tolson v Pritchard* 3 De G M & G the books of against them a tion If one ground for an to exclude an allegation of a mistake or erroneous omission or insertion. The only question is whether the books are *prima facie* evidence between partners and their estates In my opinion they are" But it is not conclusive evidence again if he can by clear evidence show that there is an 9 Ch D 549, c 5 Ir App 587, *Hutchinson v Smith* *Days* .

with
So an
But representation or misrepresentation as to the partnership is binding upon the partners in respect to some partnership 2 B & A 795, *Thwaites v R* 81, per Lord Ellenborough of several parties in fraud

as fact by the innocent parties, admitted by the Court *Raeburn v* One member of a firm can borrow money and such promissory notes as, 40 M 727, *Karmali v Karu* 11.

39 II 261.

Limitation—Saving of, by acknowledgment of one partner An acknowledgment or a payment by a partner without special authority is binding upon another partner. Under section 21 of the Limitation Act a partner who has no authority to acknowledge or to make a part payment, but if he has general authority to contract debts or make payments he has implied authority to keep the debt alive and it is unnecessary to make out a special authority.

Chegamull v Govinda Suami, A I R 1923 Mad 972 So in the absence of S.

v. Viera
18=(1918)
Ind Cas.
1 Ind. Cas.
33-35 M. 112; see also *K. R. Firm v Sathyarada*, 21 Ind. Cas 635=37 M.
146=25 M. L J 501

In *Premji v Doss*, 10 B 353, *Scott J* said at p 362. "It must be shown that the partner applied to do so to be presumed bad High Court in *Gadu Bibi v Pirsolam*, 10 A. 418 and *Candy J* of Bombay High Court in *Dulsukham v W R* 145; *Lalla v Bibu*, 32 A

) and though the partnership (*Watson v* circumstances be treated as continuing where, for instance, the retirement of a partner is kept secret and payments of interests are made in the name of the firm *In re Tucler* (1894) 3 Ch 429=63 L J Ch 777, see also *Abulali v Ranchadlal*, 38 Ind Cas 872=19 Bom L R 80 (95), *Karamali v Borahimji*, 26 Ind Cas 917=39 B 201=10 C W N 277

of payments by s of Limitation as to of that particular form of liability is of first importance, and the solution lies in stripping the proposition to the bare statement of the authority, express or implied, with which the declarant was invested at the time of the declaration The discussion is limited to admissions made after dissolution Prior to it, and whether the admission be regarded as a new contract or an extension of an old one, there need be no question of the partner's ability to charge his co partners with the act which bars the Statute But after dissolution the agency and its cessation, or rather the exact time of the determination of the agency regulates the period when such admissions or payments which operate as admissions become, as to the other partners, ineffectual *Burr Jones* § 249

partnership does not Similarly a partner of authority to give an 36 Ind Cas 225=

8 L B R 363

Parties suing or party is receivable as interest, & relation to be affected by the ad evidence as that other person may have furnished by way of admissions on this privacy may be Where the p administrator, and only adm statements may

41; *Couling v Ely* 2 Stark 368), though it may bind the person himself when he is afterwards a party, *suo jure*, in another action. A solemn admission, however, made in good faith, in a pending suit for the purpose of that trial only, is governed by other considerations.

startling proposition, says Taylor, that the assets of a testator, and the consequent rights of legatees may be affected by some inconsiderate statement which the executor, before the death of the testator, may have been induced to make' Taylor § 755 But statement of such persons is competent, if made while representing the person beneficially interested, and in the transaction of business or in performance of the trust in such manner as to be part of *res gestae* Church v Howard, 79 N Y 415 (Am), for an affidavit of guardian of an infant v Concha, 11 App Cas 541 543 So infant in another

"If he was a
while actually

G07, G11, affirmed (1897) 2 Q B 192. *Trustee v. Hunting*, (1897) 1 Q B 192. *Land etc Co*, 28 Colo 320, the Court ref
fraudulent admission of

114, Fox & Wallers, 12 A & E 43, br 3'

v. Russell, 53 Hun 17=4 N Y Supp 781 (1st Chancery H) and 70 N.Y. 1st S

operate as a waiver *Katlas v. Sheikh Chhenu*, 12 C 516, *Woodroffe*, 232.

§ 1076(2); (see also)

guardian of the person of an infant as to the property right of the latter are not for other purposes as 825, see also, 10 C L R 377, *Ammal* 24 I A rt of Wards, made bind or prejudice Cas 825=29 C L

J. 577; *Ram Aulur v. Royah Mohammad*, 24 C 853=1 C W N 117, 21 W R

253 An acknowledgment of debt

period of limitation *Ram Charan v.*

J. 375; *Sobhanadasi v. Sriramulu*

456, *Annahaganda v. Sanjidiyyapa*,

292; *Chhata v. Bullo*, 26 C 51,

guardian of a Hindu minor has no power to keep debt alive against the minor *Ramzuanji v. Kashinath*, 103 Ind C 529=A I R 1928 Mad 226

t in receiving

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other words,

the admissions of one co plaintiff or co defendant are not receivable against another merely by virtue of his position as a co party in the litigation This is necessarily involved in the notion of an admission, for it is impossible to discredit A's claims as a party by contrasting them with what some other party B has elsewhere claimed, there is no discrediting in such a process of contrast, because it is not the same person's statements that are contrasted Moreover ordinary fairness would forbid such a license, for it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statements as admissions It is plain, therefore, both on principle and in policy, that the statements of a

who happen to be joined as parties to the case See also *In re Whiteley*

L R (1891) 1 Ch 558, *Azizul*

Lachman v. Tansukh 6 A 395; *Amrit*

W R 214=2 I A 113, *Chandewar*

lah v. Himmul Ali, 23 W R 519

by one defendant can not be read in evidence either for or against his co-defen-

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being,

.. have been

S. 18. afforded for cross examination (*Jones v Fairbairn*, 2 Ves 11, *Morse v Russell*, 12 Ves 355, 361, 363), and moreover, if such a course were allowed, the plaintiff might make one of his friends a defendant, and thus gain a most unfair advantage. *Witch v Mead*, 3 P Wms 311. *Taylor* § 151

But the situation has often been obscured by the circumstance that the co-party's admissions are received against himself, and that they are sometimes received also against the other co-party because of a privity of obligation or of title. But it is not by virtue of the person's relation to the litigation that this can be done, it must be because of some privity of title or of obligation, which would indeed have admitted the statements even had the declarant not been made a co-party. *Hignior* § 1076. In *R v Hardwick*, 11 East 578. *Fletcher* borough L C J said "Evidence of a defendant in trespass will not, But if they be established to"

declaration of the one, evidence against all object" The payment period of limitation for the surety's debt. *Gopal Daji v Gopal Bin*, 28 B 248.

In *Ambar Ali v Lutfec Ali*, 45 C 159=25 C L J 619=21 C W N 100, at page 999 Mr Justice Mookerjee said "There can be no room for contrivance that the admission is good evidence against the maker of conveyance, but the question arises whether it is admissible against the other defendants. These defendants it will be observed, are jointly interested in the land now in dispute, along with fourth and fifth defendants, in fact, they claim under a common lease from the landlord, and have on the basis thereof, taken a common defence to defeat the suit of the plaintiffs. But these defendants were not joint owners of the property covered by the conveyance of 1894, and were strangers to that transaction. They consequently press the view that an admission made by the owners of that property cannot be received in evidence against them, merely because, since the date of the alleged admission, they have jointly acquired the property now in suit. In our opinion this contention is well founded and section 18 of the Evidence Act is of no assistance to the plaintiffs. The principle which regulates the reception in evidence of an admission by one defendant against another defendant, is formulated in *Sundari* 11 C 385, *Chaito Singh v Muddi*, 41 C 130=20 C W N 1217 are jointly interested in the subject matter these persons is receivable not only defendants, whether they be all joint relates to the subject matter in character of a person jointly interested is tendered. The requirement of the owners is of fundamental importance."

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"in legal interest between the joint
relationship" *shop*, 11 B
a joint owner
as in *Blakeney*
person cannot
interest in the

the other to the litigation that frequently it is not in view of the

admission against the co-defendant

the words of section 18 were perfectly clear and in as much as he made the statement when he had parted with his interest in favour of his co-defendant in the present suit, the admission made by him could not be treated as evidence of admission against the co-defendant *Banbhallay v. Union Bank 30 C W N*

S.

that the brothers were not joint at the date of the sale and that the properties were exclusively owned by U put in a deposition given by another brother K in the suit in which the money decree against U was passed in the course of which K stated that the family was not joint and the properties belonged exclusively to U *Hell*, that the deposition of K in the previous suit was not

including defendant No 6 constituted a joint family and that a certain property was joint family property. The defendant No 6 in the course of his deposition as a witness on behalf of the representatives of Upendra Nath Ghose in suit No 127 of 1911 stated that on the death of the plaintiffs' father Upendra separated from his brother and that there was no joint family. The defendant No 6 therefore was not claiming any interest in the property in question and in the 'admission' made by him in the previous suit he did not fulfil the character of a declarant jointly interested with the party, in respect of the property con-

urther more, it is

ay that at the time

No 6 there was

thers" *Nogendra*

v. Laurence Jule Mills, 25 C W N 89 (94)=61 Ind Cas 544. An admission of one defendant in a written statement in a suit will not be evidence against the

by examining that defendant who

Ind Cas 924, see also *Appar*

4 M L T 117=25 M L J 729,

s 2, *Hat Bakhsh v. Lachmuna*,

a confession of judgment by one of

nce against the other defendant

129, *Amrito Lal v. Rajanee Kant*,

I A. 113=23 W R 214=15 B L R 10, *Narindar Singh, v. C M King*,

A I R 1928 Lah 769, *Saidu v. Meher*, 101 Ind Cas 589, *Jones v. Turberville*

2 Ves Jur 11, *Hay v. Gordon*, 10 B L R 301=18 W R 450 P C, *Gopal v.*

Gopal, 28 B 248, *Worse v. Royall*, 12 Ves 362, *Daniel v. Potter*, 1 M & M 503,

Chandraeswar v. Chuni Ahn, 9 C L R 359. A co party cannot, indeed, as a

rule use the statements of his associate on the record as against the opposing

interest. He may, however, employ them in his own favour as against the

declarant *Chamberlayne v. El* § 1316

interest, and may be easily applied. Many other cases arise which cannot be brought under any certain rule but must depend largely upon the facts as to identity of interest, as they are brought out at the trial. In either case the authority should clearly appear before the statement of one should be considered binding as against another. Bare statements by an agent unaccompanied by

o doing of his principal's business, ess it were shown that the principal

In most cases the statements of an l with acts in such a way as to be part of the *res gestae*. *McKelvey v.*

S. 18. Admissions of persons having joint interest.

Persons seized jointly are seized of the whole, each being seized of the whole, the admission of either is the admission of the other and may

Nagendra v Lawrence Jute Co, 25 C

C 159=21 C W N 996=25 C L J

8 An admission made by some of several defendants in their character of persons jointly interested with the other defendants in the matter in respect of which the admission is made is binding on the other defendants *Bhika Mol v. Ganga Ram*, 69 Ind Cas 35; *Mansur Matbar v Alimuddin Khan*, 21 J. L. C. 571.

Persons and his fellows, whether they be all jointly suing or sued provided the admissions relate to the subject matter in dispute and were made by the declarant in his character of a person jointly interested with the party against whom the evidence is given.

Masjan v Alimuddin, 34

v. Mukta, 11 C 588

in evidence against those

were jointly interested,

mere community of interest will not be sufficient *Taylor Ev* § 700. An apparent joint interest is obviously insufficient to make the admission of one party receivable against his companions, where the reality of that interest is the point in controversy. A foundation must be laid, by showing that a joint interest is

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promisor is not bound by such admission *Manna v Madho*, 21 Ind Cas 165

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the admissions of party in interest. Thus the interest of cestui que trust of a bond, in a suit by the trustee, is an original interest, and not a mere incidental interest in the result of the suit, so also, the interest of persons in a policy effected in another's name, for their benefit. It is also a requisite that the statements should have been made during the continuance of the interest. Declarations, made after the declarant has ceased to have any interest in the matter are not admissions, but mere hearsay *Burr Jones* § 233. The admission of one executor does not conclude another. *Chunder Kant v Rammaram*, 3 W.

R 63 The admissions of the executor of a donor may be treated as the admission of the donor. *Dwarkanath v. Chundecchurn*, 1 W R 339. The admission of a *ryot* of the rate of rent at which he holds a tenure cannot be treated as evidence against another *ryot* to prove the rate at which he holds the tenure. *Nuroohunty v. Naramee*, W R (L. B.) 23=1 Ind Jur O S 9.

Privies in Obligation. So far as one person is privy in obligation with another, &c., is liable to be affected in his obligation under the act by the acts or admissions of

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interests

() = _____, a member of the other classes of liability. If ignore § 1077.

Joint Promisors : Co promisors like principal and sureties are also privies in obligation, and on principle the admission of one should be admissible in evidence against the other provided the other conditions are satisfied. The rule is that, in the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is, in general, evidence against all. Such was the rule laid down

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... that the act of one member of a class is liable to be taken as the act of all. So
acknowledgment of a judge

Ashanullah v. Dakhini, 37

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sions

18. of English Courts are by no means uniform in this respect. Thus in an action against joint makers of a note, if one suffers judgment by default, his signature must still be proved against the other. *Gray v Palmer*, 1 Esp 135, *Shirreff v Wells*, 1 East 48

Principal and surety. Principals and sureties are privies in obligation, i. e. one is liable to be affected in his obligation under the substantive law by the acts of the other. *Wigmore* § 1077. So where the effect of a contract is that a surety shall be responsible for the acts and admissions of the principal, such admissions are competent evidence against the surety. *Burr Jones Et* § 238. So the entries of the principal were evidence against the surety because they were made by the collector (principal) in pursuance of the stipulation contained in the conditions of the bond. *Whithash v George* 8 B & C 361; *Goss v Watlington* 4 B & B 132 (137); see also *Jordon School District v Gaets*, 23 D L R 739 (Canada), *Sanders v Keller*, 18 Ida 592. But ordinarily where a principal is not a party to the suit his declarations are not admissible, unless they are made while the employment in which the principal was engaged continued, and in such manner as to be part of the *res gestae*. *Burr Jones* § 233. The principle is thus laid down by *Greenleaf*: "The admissions which are thus receivable in evidence must be those of a person having at the time some interest in the suit to which he is a party."

It looks chiefly to the real parties in interest, in the same weight, as though they were parties to the record. Thus, those of the persons interested in a policy of the *cestui que trust* of a bond; those of the persons interested in a policy effected in another's name, for their benefit; those of the shipowners, in an action of the identifying creditor, in an action against a deputy sheriff in an action against the high sheriff, are all receivable against the party making them. And in general, the admissions of any party represented by another, are receivable in evidence against his representative. *Greenleaf* Et incidentally or contingent interest in the introduction of hearsay evidence. *Burr Jones* § 233.

so as to become part of the *res gestae* otherwise not. The surety is considered a party, and not for whatever he might be to proof of his conduct by original evidence, where it can be had, *ex parte* all declarations of the principal, made subsequent to the act to which they relate, and out of course of his official duty. *Greenleaf* § 197. So in an action against a surety the admissions of any admissions of the principal are receivable against the surety. *Rambhia v Sreedevi*, 25 M L J 668, *Lush J* 87.

had received. *Chesney*, one being a clerk, confessions of embezzlement made by the principal after his dismissal, inadmissible in evidence (*Smith v. Whittingham*, 6 C & P. 78. *Goss v. Hail*, 11 D L R 117).

37), though, *Whitnash*
McGahery v.
cise of Lx
 it even a decree against the principal
 to the amount of debt, but see *Drum-*
mond v. Priestman, 12 Wheat 515

the money that the wife's admissions of the receipt by her of the carriage and horses were admissible *Francis v. Lewis*, 10 Johns 35, *Greenl* 1; § 187 So when A guaranteed the performance of any contract that B might make with C, the admissions and declarations of B were held admissible against A, to prove the contract *Wells v. McDouell*, 5 Bing 195; *Greenl* 1; § 187.

But where the surety, being sued for the default of the principal, gives him notice of the pendency of the suit, and requests him to defend it, if judgment

they operate against the surety *Greenl* 1; § 183

Privies in Title The admissions of one who is privy in title stand upon the same footing as those of one who is privy in obligation (*Vide supra* p 343) Having precisely the same motive to make correct statement and being identical with the party (either contemporaneously or antecedently) in respect to his ownership of the right in issue, his admissions may, both in fairness and on principle, be

The grounds upon which the party makes his admission are 1 A & E 1

Gibblehouse v admissible evidence of any fact admitted by them to be true, and may be given in evidence to prove it, notwithstanding the confessions might be such as to show a

non est when making

party extends not only to the admissions of them against himself, but against all who claim or derive their title from him, in other words, between whom and himself there is a privity There are four species of privity privity in blood, as between heir and ancestor privity in representation as between testator and executor, common privity of

confessions . . It is asked, why not swear him? The answer is, the other

The admission of a zamindar that the holding of certain tenants is **S.**
Moharrures at a given rent is binding on any zamindar who succeeds him without
 being an auction purchaser at a sale for arrears of revenue. *Watson v Nobin*,
 10 W R 72.

Sales for arrears of Revenue . . .

Lat. - Bom L R P C 78: Pureshnath v Ananta Nith, 9 I A 147, *Watson v Nobin*, 10 W R 72 The auction purchaser at a revenue sale acquired all the rights, which the original seller at the date of perpetual settlement had *Forbes v Meer Mahomed*, 20 W R (P C) 44 He is not also bound by the admission of the previous owner *Rungo v Ry Coomaree*, 6 W R 197; *Radha v Rakhai*, 12 G 37; *Paisa P v P* . . .

judgment debtor *Dinendro v Ram Kumar*, 7 C 107 P C = 8 I A 65 = 10 C, L R 281. In *Lala Prabhu Lal v Mylne*, 11 C 101 (413) it was held that an auction purchaser is not a representative of the judgment debtor. See also *Gour S* . . . evidence Act 6 W R 197, 1 *ay Coomaree* is not barred a purchaser *Koodep v Govt of India*, 11 B L R 71 (P C) = 11 M I A 247 Where the property is sold in execution of a decree, it can not be correctly said that the owner gives any right to the purchaser. *Mulji v Kashi Bai*, 10 B . . . judgment debtor to the extent

his wish, and he is not bound by some of the acts of the judgment debtor, such as alienations made by the latter to defeat the decree but that does not show is not the any purpose *huz v Hemi* is not in my By this In a later representative of *Protonno* 26 C 250 a purchaser held in execution of a simple money decree against a judgment debtor is a representative of the

the representative the nature of the judgment-debtor and the auction purchaser and the interests of the two are conflicting, the auction purchaser can in no sense be considered to be a representative of the judgment debtor *Narotam v Sulhraj*, A. I. R 1928

18. Am 377]; made again more would claiming under him b received in that the declar his interests were such of his title or possession would have to his own *Chadwick v Fournier*, 69 N. Y 404. In the same manner the admissions of a devisor are competent against the devisee, those of an intestate against his administrator, and those of a testator against his executor *Broadbush v Jarvis*, 13 Cal App 464. Thus in an action by an administrator against the widow of his intestate for the conversion of property, declarations of the intestate that his tenant was to pay no rent are admissible for the defendant *Mooney v Mooney*, 80 Conn 446, see *Nuttall*, 1 M. 6 C & P no rent, Am Dec administrator, or any other claiming in his right *Smith v Smith*, 3 Bing N C 29; *Lat v Finch*, 1 Taunt, 141. A statement by the testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would therefore be admissible as evidence *Nina Shanker*, 3 Bom L R 465.

Life estate

admissions are to distinguish be tail. A tenant for life cannot, unless empowered by some statute, preclude an admission, the interest of a remainder man or reversioner, but a tenant in tail is regarded as representing the inheritance, and, therefore, what he says or does, will often be binding on the person entitled in remainder *Taylor* § 20. So the remainder man is bound by release of equity of redemption by a tenant in tail in possession *Reynoldson v Perkins*, Amb 563, *Pendleton v Smith*, 4 T. 71, that were not *Pendleton*. *Rao*, 82 Ind Crs 1002; 86 Ind Crs 853. But by Act of 1858 & 3rd decisions as regards acknowledgment have been made absolute. The declarations of the tenant for life, do not bind the remainder man, as there is no privity between them, for a privity in estate is a successor to the same estate, not to a different estate in the same property, and the statements of the tenant for life are not admissible against the owner in fee *Hill v Roderick*, 4 Wills & 2 (Pn) 221.

prideces or as though they were his own *Jackson v Davis*, 5 Cow. (N. Y.) 11. An admission made by landlord, after creation of tenancy is not binding on tenant. An agreement between two proprietors to become joint proprietors not binding on tenants *Puran v Dhanpat*, 52 Ind Crs 739. But the declarations of the tenant are not admissible to affect the title of the landlord *Jones* § 243.

The admissions of mortgagor as against mortgagee are on the same footing as those of grantor and grantee, and evidence only in as far as they affect

estate mortgaged, and are limited in point of time to those declarations made before the signing of the mortgage *Loote v Beecher* 78 N. Y 155 An admission by the surviving daughter of a member of a joint Hindu family, that the children of her deceased sister were entitled to her father's share was held to be evidence of the existence of the title before the suit *Gour Lal v Mohesh*, 14 W R 181

Vendor or Assignor of personalty The same principle holds in regard to admissions made by the assignor of a personal contract or chattel previous to the assignment, while he remained the sole proprietor, and where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of its transfer, in such case, he is bound by the previous admissions of the assignor, in disparagement of his own apparent title. But this is true only where there is an identity of interest between the assignor and

already stale, or otherwise infected with circumstances of suspicion *Harrison v Tallance* 1 Bing 15, *Greent Fv* § 190, *Faylor* § 790 citing from *Greent Fv* § 190 Thus, the declarations of a former holder of a promissory note negotiable

is not to be cut down by the acknowledgment of a former holder that he had no title *Barrough v White*, 1 B & C 325 explained in *Woolway v Fove* 1 Ad & Ll 114 116, *Shuo v Droom*, 1 D & R 730, *Beauchamp v Parry*, 1 B & All 89, *Hickell v Martin*, 3 Greent 77 So, so far as choses in action are concerned, this is one exception to the general rule already stated Therefore declarations of a former owner of negotiable paper are not admissible against one

of the indorser made while the interest was in him are admissible in evidence for the defendant *Bayley on Bills*, 502, 503, *Pocock v Dillings* Ry & M 127

Admissions of
the act of insolvency,
evidence against one
nam v Radha 31 C L J 107=49 C J3 66 Ind Crs 15, see also *Re v Tolle-*
mache, 13 Q B D 720 *Re Bottomley*, 81 L J K B 1020 So also evidence
taken in the public examination of an insolvent cannot be used as against a
third party to prove or disprove a title *Jnanendra v The Official Assignee*,
30 C W N 346, *Re Brunner* 19 Q B D 572 *In re Cooper* 19 Ch D 580
Madkoram v Official Assignee, 27 C W N 611

Illustrative cases of Admissible evidence In order to be a relevant admission, it is necessary to show that the person who made the statement had an interest at the time when he made the statement *Jogeswar v Akhoy* 19 C L J 1=22

as admissions only when the admissions are of a date prior to the date of their deriving interest Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against the party

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18. A I R 1927

by accused to a Police officer are

under ss 17 and 18 of the Evidence Act. *Amudmy v. Emperor*, 44 C L J 233 = A I R 1927 Cr 17. A statement made on oath by the accused before the Coroner at the time of the inquest is admissible in evidence at the trial as a statement made by a party to a proceeding under ss 18 and 31 of the Evidence Act. *Emperor v. Raminath*, 28 Bom L R 811 = 50 B 111 = 93 Ind Cr 690. A statement in a case drawn up by an attorney for the opinion of a pleader is admissible in evidence as it must be regarded as a statement of the persons on whose behalf he was acting and what is said or done by him in the course of his business and within the scope of his authority is said or done by the persons on whose behalf he was acting. *Chandraswar v. Biseswar*, A I R 1927 Pat 61 = 5 Pat 777. A party is bound by the questions of facts, whether

Ganesan, A I R 1929 All 146. The admission

unsupported by other proof, should be received and citation *Urs L v. W L*, A I R 1928 Sind 55 = 105 Ind Cr 410. A statement made by an agent to the effect that his principal was a bankrupt was admissible in evidence as an admission under section 18 of the Evidence Act. *Raj Futeh Singh v. Balloo Singh*, 3 Luck 416 = 109 Ind Cr 310 = A I R 1928 Oudh 233. An admission if gratuitous, can be withdrawn at any time and therefore such a confession though against the interest of the party making it, is of little value. *Badhu Ram v. Uttam Chand*, A I R 1925 Lab. 726. A Bitwar paper signed by the Partition Deputy Collector and containing entries required by the provisions of Ch 7, is a record made in the course of official duty within the purview of s 35, Evidence Act. It would also be evidence against the proprietors under ss 18 and 13, Evidence Act, because they

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him *Jumuna v. Fa la*, A I R 1929 Pat 254 = 10 P. L. T. 183. A pleader has authority to admit certain facts so as to dispense with the necessity of further proof in a criminal case at the trial. *A I R 1928 Bom 241 = 36*.
be proved by the plaintiff

accused under section 18 of the Evidence Act. *Amudmy v. Emperor*, 44 C L J 233 = A I R 1927 Cr 17.

Illustrative cases—Inadmissible evidence. An admission made by a creditor after transferring his debt to a third person to the effect that the debt had been paid to him in part or whole before he had sold the claim, is not binding upon the vendee under section 18 of the Evidence Act. *Wasana Singh*, 25 Ind Cr 101.

made by his *Mul hear* of the authority conferred by another plaintiff *Ahmad v. Janahar*, 84 Ind Cr 101.

257 = A. I. R. 1923 Lah. 16. A party cannot be bound by admission of his pleader as to law in as much as the parties must be presumed to know what is correct law. *Chantoo v. Murlidhar*, A. I. R. 1926 Oudh 311 = 13 O. L. J. 138 = 92 Ind. Cas. 732; *Fateh Ali v. Ahmal Din*, A. I. R. 1927 Lah. 281 = 100 Ind. Cas. 833; *Panjabi v. Bhagwan*, 31 Bom. L. R. 89 = A. I. R. 1928 Bom. 89, *Mutha Chetti v. Muthu*, A. I. R. 1927 Mad. 852 = 26 M. L. W. 465 = 39 M. L. T. 240; *Ulchi v. Natlamali*, A. I. R. 1928 Mad. 90. Recitals, regarding the boundaries in a document not *inter partes* and statements made by third parties cannot be admitted. *Sarat Chandra v. Sarala*, A. I. R. 1928 Cal. 63 = 105 Ind. Cas. 6. one of several defendants in *Narindar v. C. M. King*, A. I. R. 1929 Lah. 129. *Kishan v. Lachman*, A. I. R. 1930 Lah. 133. Neither the declaration of a donor nor the declaration of evidence is against the R. 1928 Oudh 114. capable of being regarded as a stale or time barred claim, it is to his interest to make allegations which would save the claim from the bar of limitation. Having

were actually made *Ammallu*

Admission by one of the defendants that the land in a suit is ancestral is not binding on the others when they are not represented by him and have independent rights of their own. *Aishore v. Lachman*, 123 Ind. Cas. 109 = A. I. R. 1930 Lah. 230.

The Mohants of *Deva Prithi Sahab* are managers. A Chela must first be nominated

cannot be regarded as admissions

Worshippers are not bound by the admissions of previous Mohants. *Ram Parshad v. Shivomani*, A. I. R. 1931 Lah. 161; but see *Vidya Purna Tritha v. Vidyanathi Tiratha*, 27 M. 435; *Ilargan v. Baldev*, 127 P. R. 1908 = 123 P. W. R. 1908 (F. B.)

19. Statements made by persons whose position or liability

Admissions by persons whose position must be proved as against party to suit it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustrations

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

Scope of the section. Ordinarily statements by strangers to a proceeding are not relevant as against the parties. *Coolie v. Bahan*, 3 Ex. 183. But in some cases, the admissions of third persons, strangers to the proceeding are receivable. *Green v. Ly* § 191, *Taylor* § 759. The admission of a third person against his own interest, when it affects his position or liability and when that

5. 19. to add to the category of persons by whom a statement may be made before it can be considered to be an admission within the terms of the Indian Evidence Act. The statements referred to in section 19 become admissible only provided that the
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- Apparatus
- to property,
- the nature of
- has not been

statements are admissible
 of such persons at a particular time; in which case the practice is now evidence in general is would be legally admissible in an action between the parties themselves *Green v. § 181* Thus in actions against the sheriff for not executing process against the debtor of the debtor admitting his debt to be due to the execution
 the sheriff *Kempland v. Macaulay*,

42, *Re Brunner*, 14 Q. B. D. 572
 person has been held sufficient evidence, on the part of the defendant, to support a plea in abatement for the non joinder of such persons as defendants in that suit; it being admissible in an action for the same cause *Clay v. Longslow*, 1 of a bankrupt, made before the act of

Re Tollemache, 14 Q. B. D. 415,
 An admission made by a line

Jarret v. Longslow,
 use of the
§ 181
Edna v. D. 72
 his being
 others,
 1199

Mal, 11 Lah. 503—A. I. R. 1930 Lah. 579—128 Ind. Cas. 300.
 title, proceedings in a previous title suit instituted by defendant against three persons are relevant under this section *Jairam v. Loke Nath*, 125 Ind. Cas. 782—A. I. R. 1930 Pat. 405

Illustrative Cases—Admissible Evidence Where in a case of a disputed deed of adoption the defendant alleged that the deceased executant had become shortly after the execution of the deed aware of its existence, purport and nullity

taken regarding it, cannot be excluded as irrelevant, but is admissible under section 19, 19 or 191 or section 11 of the Evidence Act in a

for a long time in an admission in the defendant tenant's favour and amount to setting up a custom *Janaki Kuar v. Usman*, 62 Ind. Cas. 417, see also *Rameshwar v. Dada*, 60 Ind. Cas. 721, C. D. 197. An admission made by a person against and from the for

question at issue was whom her mother was, it was alleged, that she was described at which she stated that she

had been living with the alleged father for 10 or 12 years, even if admissible in of no weight for the reason that her statement does not amount to an admission that she was living in adultery. *Maqbulan v. Ahmad Husain*, 26 A. 108 P. C = 8 C. W. N. 241-6 Bom L. R. 233-31 I A. 38

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration

The question is whether a horse sold by A to B is sound. A says to B—
"Go and ask C; C knows all about it." C's statement is an admission.

Principle. If a party, instead of expressing his belief in his own words, names another person as one whose expected utterances he approves beforehand, it is an admission that he does not believe in his own words; and it is an admission that he does not believe in the words of the person named; and it is an admission that he does not believe in the words of the person named by himself."

7 A. & E. 468, *Richards v. Morgan*, 33 L J Q B 114, *Wills' Ev* p 162

Admission by persons expressly referred to by party to suit. It not

cases, the party is bound by the declarations of the persons referred to, in the same manner and to the same extent as if they were made by himself. *Burton Jones*, § 263, *Solomon v Herne*, 2 Esp 695, *Williams v Bridges*, 3 Stark 42, *Kempland v Macaulay*, Peake's Cas 65. In such a case the admission of a third person are receivable in evidence, against the party who has expressly referred another to him for information, in regard to an uncertain or disputed matter. This species of admissions is well rec

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Esp 145, on 7
to A, and he
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what he says

if it is connected with the business which is referred to him, is evidence." In *Daniel v Pitt*, 1 Camp 364 note, defendant said, "If C will say that he did deliver the goods, I will pay for them." In the circumstances C's admission was held admissible. Similarly in *Brock v Kent*, 1 Camp (note) defendant desired the plaintiff to enquire of Jones about it, Jones being a person who had paid money. Jones' statement was held admissible. In *Garrett v Ball*, 3 Stark 160, which was an action of trover for a horse the plaintiff had said "if the defendant would take his oath that the horse was his, he should keep him." The fact of the defendant's affidavit was held admissible. In *1 C & P 532* the defendant said "him" he meant one H. His statement was held admissible. In *Sydney v Smith*, 1 C & P 532, the defendant said "the horse was killed was to charge the defendant, because he was the owner of the horse." In *R v Mallory*, 1 C & P 532, the defendant receiving stolen goods by the accused, the accused referred the police to his wife for a list of the prices and dates of purchase of the goods, stating that he did not know the value of the goods.

20. not know them, and the next day the wife handed the police the list in his presence. The list was received, is an admission of the price, and date. This is the principle of awards by reference on a contractual basis. *Rests on a contractual basis* is pronounced in *Higginson v. H. & S. Co., infra*. Such statements which were in the nature of awards required no stamp even when in writing. *Tay § 701.*

What questions may be referred. In the application of this principle, it matters not whether the question referred be one of law or of fact; whether the persons to whom reference is made, have or have not any peculiar knowledge on the subject; or whether the statements of the reference be adduced in evidence hereafter where two parties had on the construction of a Statute, it was held bound thereby & *Sel 105; Douns v. Cooper*, and can be referred to a third party.

Sybray v. White, 1 M & W 435; *Taylor § 761*

Reference must be express. This rule must not be understood as giving the force of an admission to statements made by a witness as against the party who calls him. *Gardner v. Moulton*, 10 A & E 463, *R. v. Latchford*, 6 Q B 567, 577, *Bricknell v. Halse*, 7 A & E 456. There must be an express reference for information in order to make the statement an admission. Thus if A says, "I will now say what I know," the matter will

Killinger, 8 Wall (U S) 480 (Am). Thus, where a defendant stated that a book keeper would furnish whatever information was contained in the books, the

party makes the referee his accredited agent for the purpose of giving such answer. *Evatt v. Hudson*, 97 Ark. 265. If a party, on motion before a Judge, uses the affidavit of another person to prove a certain fact deposed to therein, such affidavit is on any subsequent trial evidence as against him of this fact, and that too, though the person who made the affidavit is present in Court. *Brickell v. Aulse*, 7 A & E 454, *Bollen v. Rullin*, 2 Ex. R. 675 (679), *Prichard v. Bughshaw*, 11 Com B 459, *Johnson v. Ward Esq* 47; *White v. Dowling*, 9 Ir L R 128, *Tay*, § 764.

does not affect the reference. *McElue v. Troubridge*, 111 Hun 23=22 N.Y. Supp. 674 (Am); *Burr Jones § 263* irrespective of the

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mere admissions are not conclusive as is provided in section 31, but admissions

Gorahan v Husain, A I R 1927 All 659=103 Ind Cas 34, *Himanchal Singh v Jatwar Singh*, A I R 1924 All 570=46 A 710=10 Ind Cas 16, *Muhammad Imtiaz*, A. W. N (1893) 200; *Keshoram v Piar*, 71 Ind Cas 761, *China v Venkata*, 42 M 625

Admission by interpreters To render the declarations of a person referred to equivalent to a party's own admission, it is not necessary that the reference should have been made by express words but it will suffice if the party by his

interpreter should be considered a

nd are in no sense hearsay, nor is it necessary that his interpretation
A wife's statement
Schutter v Williams
ed by two persons
ication with each
statements of what

circumstances is
during a trial is
Scheerer v Harber,
cannot be admitted
People v. Ah Yute, 56 Cal 119 (1m)

Deposition
of a party's w
the House of

- 21 Ings as admissions *British Thomson Houston v British Insulated etc Co* (194) 2 Ch 160, *Phip Ey* 214 Unless an express reference has been made to a witness on a certain question his statement will not constitute an admission as regards that question L R 2 All 209

Criminal Cases This section is applicable to criminal cases as well. Thus where the accused told a constable that his wife would make out a list of certain property, a list afterwards made out by her was held evidence against him. *J* expressly refrained from the effect of the previous evidence and where he had asked for certain inquiries to be made, facts elicited in direct answer or mere hearsay, are evidence against him *v Cambell*, 8 Cr App R 75, R v Westwood

Illustrative cases—Admissible Evidence The plaintiff and the defendant in a suit signed a written statement that he may against the plaintiff. Held that the statement of G must be taken to be an admission made in the suit by a nominee of a party thereto which was effectual as an admission by the party himself. *Humanchala v Jatuar* 80 Ind Cas. 16 A I R 1924 All 570, see also *Gordhan v Husain*, A I R 1927 All 603=103 Ind Cas 34, *Sitaram v Prasad* 47 A 921, *Muhammad v Imtia*, A W N (1898) 200

Illustrative cases—Inadmissible Evidence A party to a litigation is not bound by the statement of the mukteer of the opposite side who was cross-examined by the parties. *Mt Srimati Ausanbati v Ram Jas*, 4 U P L R 9 (Rev)

21 Admissions are relevant and may be proved as against

Proof of admissions the person who makes them, or his representative in interest, but they cannot be proved against persons making them and by by or on behalf of the person who makes or on their behalf them or by his representative in interest except in the following cases —

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

- (a) forged or is not a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the captain of a ship, is tried for casting her away.
Evidence is given to show that the ship was taken out of her proper course.
A produces a book kept by him in the ordinary course of his business day to day, and
A may prove
and parties, if he

were dead, under section 32, clause (2)

(c) A is accused of a crime committed by him at Calcutta

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2)

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue

(e) A is accused of fraudulently having received property

and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration

heads are receivable is discussed under each topic (*vide infra*)

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the general rule as an admission *Abdul Gham v Emperor*, A. I. R. 1931 Lab. 763 The primary rule in section 21 is that an admission is relevant and may be proved as against the person
Gulab v. Fadali, 68 Ind Cas
evidence against him *Lachman*.
Ma Tha, U II R. (1897-1901)
be proved in a criminal case just as much as an admission by the defendant in a civil suit under section 21 of the Evidence Act But an admission under that

- 21 section is one made by the party against whom it is tendered before the proceedings in which it is sought to be given in evidence. It does not refer to pleadings in the case or to an admission contained in such pleadings. *Jemima v Vas* 1 Ind Cas 961=10 M L T 506=(1911) 2 M W N 576. A statement whereby of money is in most cases an

to a police officer is not if he is on his trial as an accused person yet it is acceptable in a civil suit as an admission under sections 17, 18 and 21 of the Evidence Act. *Bishandas v Bawa* Labhaya, 32 Ind Cas 18=106 P I title which was non-existent though making it if the title admitted had 37 Ind Cas 933. A member of a Hindu joint family, whose house was at Lucknow, practised as a pleader at *Hardoi*, and made considerable savings from his professional earnings. He eventually became managing member, but was all along District earnings so entered

he purchases in the name of B was a statement against his own *Sury Narain v Ratanlal* 40 Ind

Cas 988=21 C W N 1065=20 O C 211=19 Bom L R 737=15 A L J 684. A written agreement by a tenant to pay the *Suamtantram* or *Thandurava* is admissible as an admission of the evidence of custom unless the tenant explains away the admission and its effect can not be discounted or neutralised on the ground that the admission is recent. *Kumarappa v Manappa*, 44 Ind Cas 699=41 M 374=1918 M W N 350 (F B). An oral confession by an accused person not being open to exception under section 24, 25 or 26 of the Evidence Act is as an admission by an accused person a relevant fact, and may be proved at his trial under section 21, and therefore such a confession made to a Magistrate is relevant, and may be proved by the evidence of the Magistrate. *Ieroz v Emperor* 45 Ind Cas 843=11 P R 1918 Cr=19 Cr L J 651, see also *Per Heurard J in Emperor v Maruti*, 54 Ind. Cas 465=31 Bom L R 1065=21 Cr L J 65, *contra Per Shah J in Id.* The statement of an accused person as a witness in a previous case is admissible against him under this section to prove admission of relevant facts made by him in that statement. *Emperor v Banarsi*, 77 Ind Cas 629=23 A L J 144=46 A 254=25 Cr L J 477. An entry in the body of the bond that no further account is outstanding against the debtor does not bind the creditor in any way and is merely an admission by the debtor in his own interest. *Gurdilla v Nabi Balsh* A 1 R 1926 Lah 391=93 Ind Cas 996. The statement that a document is a copy of the original is admissible when made by a deceased person in a document admission under s 21. *Secthaya*

W N 578 (P C) Entries in

purchase for client

Ram v Madan

531 (P C) An

weight, but it

operates as an

after him his her

v Rabishankar

v Ahmed, 1923

before a military

criminal charge in a Civil Court

17 D 190

were untrue. *See Dev* L R 109, see also *Hirani* statements made by a soldier evidence against him on a *R v Colpus*, (1917) 1 K B 674=50 L J

wholesome provisions elaborately laid down in these two sections practically reduced to a nullity. *Queen Empress v Bhaurab*, 2 C W. N 702 An oral statement made by a witness in a relevant case made by a Magistrate. J 651; see 2 P R 1837
Cr; Rajkumar v Emperor, 9 Pat L T. 449-A I R 1928 Pat 473; *Mulan Guru v Emperor* 1 Pat L T 81-73 Ind Cas 963-24 Cr L J 723; *R v. Croux*, 81 J. P 238 : against him who accused a Police officer may D to a m, 106

admissible as admission *Satish v Bheswar*, A I R 1930 Cal 559 But an admission of judgment by one of several defendants is no evidence against his co defendant *Rashiduddin v Nazimuddin*, 11 Lah L J 401-A I R 1929 Lah 721

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32, of the Evidence Act, or it must be relevant otherwise than as an admission. In either case its value would be slight *Parah Chandra v. Prasanna*, 78 Ind Cas 719-28 C W. N 679-39 C L J 339

Representative in interest

would be admissible against him claiming under him by descent, and in the same manner as they would *Green v* § 189, *Davis v Melson* of one having or claiming title him, they are competent against persons subsequently deriving title through or from him *Burr Jones* § 212 An admission against her own interest by the predecessor in title of the defendant is relevant under ss 18 and 21 of the Evidence Act to shift the burden of proof Ind Cas 700 The term "legal representative" C. P. C. cannot be the estate of the decedent *Narain v Jai Kishan* are of three kinds, namely (1) privies in blood, such as ancestors and heirs (*Weeks v. Birch*, 69 L. R 759) (2) privies in law, such as executor of a testator or

21. administrator to an intestate, and (3) privies in estate or interest as vendor and purchaser, grantor and grantee, donor and donee, lessor and lessee etc (*Lal bourn v Brougham*, 9 App Cas 307) *Phip Ev 11th Ed* p 219 The term "representative in interest" is rather vague (*Ishan v Beni*, 24 C 62, 72) but it seems to include most of the privies in blood, law or estate. *vide notes* to section 15, *Woodroffe Evidence* p. 235 So a party is bound by the admissions of his father and *Pettell*, 5 B & A 22 *Meath v Winchester* 3 Bing N C 183; also a statement by a party's predecessors *Doe v Latham*, 7 C & P 481 But such admission is not binding on the successor if the statement is made after he has parted with his interest. *Doe v Webber*, 1 A & E 74, *Pocock v Billing*, 3 Bing 269 An auction purchaser in a money decree is a representative of the judgment debtor. *Ram Coomar v McQueen*, 18 W R 166=1. A Sup Vol 40; *Unnopoorna Dass v Muffer Poddar*, 21 W R 14, *Ishan v Beni*, 24 C 62, *Kishore Lal v Ganja Ram*, 13 A 28, *Harhajal v Narayan*, 1924 Nag 208, *Mahomed v. Kishori*, 22 C 909, *Badri v Jai Prakash*, 16 A 483, *Sundara v Tenkatarajada*, 17 M 228, but see contra *Manohar v Samra* 17 A 428 A purchaser at an execution sale in privity with and the representative in interest of the judgment debtor within the meaning of section 21 of the Evidence Act, so as to be bound by his admissions Where therefore in a mortgage suit the mortgagor is a prior mortgagee the purchaser of the

mortgagors and their representatives in interest under section 21 of the Evidence Act *Podam Kuwar v Nahu Singh*, 39 Ind Cas 635=1 P. L. W 418, *Pa* 13 *Nath v Jadoonath*, 7 W R 441, *Gadian v Veerappa*, 26 Ind Cas 899=23 M L J 92, *Bulal v Bihari*, 76 Ind Cas 815; *Bakshi v Laladhar*, 35 A 303 A recital as to the passing of cons evidence against the transferee Act *Narain Singh v Bhukha* 17 Ind Cas 444=10 A L J 221=35 A 194 admissible against another re through the former *Golab v Tadali*, 68 Ind Cas. 568

Admission cannot be proved in favour of the party making it Admissions are not admitted as testimony of the declarant in respect of any facts in issue *State v Willis*, 71 Conn 293 P's carriage was driven against M's carriage, whereby M's thigh was broken On the trial of an action by M against P for

nesses to speak to having heard him make such statements the most worthless evidence would thus be imported in the case *Can Ex p* 136, see also *R v Hart* 91 How St Tr 1002 *see also* *fetcherine*, 7 Cox 82-83 352 hearsay by a person can in favour of his certain exceptions per on is admissances which g

to be Sutherland v rejected because itself favourable had a weak case suborning will A vast mass of

an admission made by the plaintiff's lessor in his own favour and was consequently not admissible under any of the provisions contained in section 11, 13, 21 or 32 of the Evidence Act *Radha v Sarbeswar*, 86 Ind Cas. 674=29 C W, N 469=A I R 1925 CIL 689

Ev § 520, *Phip* *Ev* p 223 The framers of the Indian Evidence Act in this

and (3) of the section. The reason for these exceptions are thus given by Mr Cunningham "this rule (i.e. admission cannot be proved in favour of the person making it) however, if enacted without any relaxation would work harshly as there are some statements which though they are in the interest of the person making them, are yet from some particular circumstances deserving of special credit. Such for instance, are the statements mentioned in section 32 of the Act, to which illustrations (b) and (c) refer. Practically the effect of this and the following exception is to let in a very large number of admissions as evidence in a man's favour, given to them" *Cum Ev* 137.
tive force. An admission against evidence, not only against parties in title, but also against strangers. *Rajcoomar v Bissessur Dyal*, 10 C 688.

Clause (1) The securities which have been devised by municipal law for insuring the veracity and completeness of the evidence given in Courts of Justice vary, as might be expected, in different countries, and with the systems of law in which they are attached. Several of those are principally relied on by the English law, such as the publicity of judicial proceedings, the compulsory presence of witness in open Court and the right of cross examination, etc. *Best Ev* § 51. Of these safeguard against false testimony confrontation and cross-

another, cannot be received in any criminal Court to affect anybody except him. Every individual who stands upon his trial in a British Court of Justice has a clear right to have the witness brought in front of the Court, to be submitted to his cross examination, that he may have an opportunity of interrogating him respecting all the particulars of the fact. We have seen that this rule is not violated when an admission is received against a party making it. But the same principle is not available when the admission made by a party is received in

as a relevant fact must have some probative force. So in eight cases where such

statements are made admissible by section 32, the circumstantial guarantee of trustworthiness has been shown. Clause (1) lays down that an admission by a person may be proved by or in behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as

such admission is always admissible. Section 34 of the Indian Evidence Act enacts that entries in books of account regularly kept in the course of business shall be relevant evidence though not sufficient of themselves to charge any person with liability. *Josuant v Sheo Naran*, 16 A. (157 (161))=21 I A 6. The admission of such entries on behalf of a person making them is an exception to the general rule laid down in section 21 of the Act. But where the documents are not proved to be account books regularly kept in the course of business their admission is illegal because proof of the entries therein would be in violation of

ments against proprietary interest
custom or matter of public int
sions of
behalf

of pay
fall within the language of section 32 of the Indian Evidence Act
and although they are
section 21 of the Act
purchased the holding

the entry in the sale certificate might be used in evidence in favour of
landlord. *Manik v Jagadindra*, 24 Ind Cas 263 see also *Farah v. Prosanna*, 73
Ind Cas 719=28 C W N 679=39 C L J 389. Statements as to the date of
birth of a person contained in his census returns and in affidavits filed by him are
admissible in evidence under section 32 of the Indian Evidence Act, if made by
or hearsay. *Ram v. Ram*, 19 Ind Cas 208. A statement made
inter alia that
by one of the parties
in suit arose in
266. A statement
certificate, obtained
decree against the
person by him or his predecessor in title, and it cannot be used as evidence,
does not come under any of the exceptions to section 71. *Ramant v. Mahanand*,
31 C 380. So also a recital in a writ of attachment is not admissible in favour
of maker of the statement and is against persons who claim under an independent
title. *Moheseruddin v. Sumera*, 15 Ind Cas. 510. On the question whether
the Courts below should or should not have received in evidence the testimony
of a
document
person
suit
Act,
Babu Madho Das, 19 A. 77 P. C.

section 21 of the Evidence Act and exclude road cess returns which are sought to be admitted in favour of the person by or on behalf of whom they have been filed

against persons other than the one who has made the return. *Chalho v. Jhara*, 39 C. 995. A cess-return filed

by a stranger against another

Dina Nath, 43 C. L. J. 425.

of any person who claims a

title in interest. *Lachmi v. Jag Mohan*, 18 C. L. J. 633 (636), but see *Ramprosad*

v. Lala Sham Narain, 11 C. L. J. 22, where it is ruled that section 95 of

the Road Cess Act has no application, to the case where the parties who

tendered road cess returns in evidence were not the persons who filed them,

in pursuance of the provisions of the Act. Road cess returns are admis-

sible in evidence against the person by or on behalf of whom they are

filed. *Hem Chandra v. Kali Prasanna*, 30 C. 1033 P. C. - 8 C. W. N. 1,

Suarnamoy v. Sourindra, 89 Ind. Cas. 747-42 C. L. J. 14. The effect of

section 95 of the Cess Act is to prohibit the admissibility of return when

tendered in favour of person of filing it, and it has, and was intended to have no

immateral whether it was put in evidence directly to prove an admission or indirectly for some other purpose. *Ram Narain v. Hara Narain*, A. I. R. 1926 Cal. 727-92 Ind. Cas. 104.

Clause (2) "Clause (3) has received no illustration in the Act, probably because it has already been

21. relevant admission when religion of deceased person is a fact in issue *Lange v. Leon*, 7 R. 720—A. I. R. 1930 Rang. 42.

concomitants of illness and of physical
nervousness of pain and distress. I think
ity of the case." *Dennis J. in Callender*
n *State v. Davidson*, 30 Vt. 383 (Am.)
party are received to show the extent
general ground that such injuries are

incapable of
their effect."

It would be
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543; see

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suffering. In some cases it seems to be required that the person be otherwise in
an apparent condition of bodily ailment, of which his statements are the natural
product. *Penn Mutual L. & Co. v. Wiler*, 100 Ind. 103 (Am.); *McMurry v.*
Rogby, 80 Ia. 325 (Am); *Wigmore* §§ 1718, 1719.

Who may testify as to statements. The extrajudicial statement of one
suffering pain or conscious of other bodily sensation may, as well as his
coherent or incoherent (jactitation on the same subject, be testified to by any one
who heard it. Accordingly, a wife, parent, daughter, nurse, other attendant, or
even a mere bystander is permitted to detail the statements to the Court.
Even the declarant himself may testify as to his own statements. *Chamberlayne's*
Ev § 2625.

to us of any degree of coherence. Whatever this may be, whether that of a single
word, or series of words, a disjointed or completed sentence, the evidentiary
purposes is the same. We are dealing with circumstantial evidence, logically
tending to establish the existence of a relevant bodily condition. On this ground
exclamations indicative of present pain suffering or distress, are normally
received without objection. *Chamberlayne's Ev* § 2626.

Kinds of fact narrated—statements of past events and conditions.

because they do not relate to an important state and thus other evidence is

is narrative is admissible as to who caused
R. v. Gloster, 16 Cox Cr 471 (173) The rule
Cleland & Co v J R Co v Newell, 104 Ind
 essent existing pain and of its locality are

admitted upon
 whether pain
 beyond the ne

ings, pains or symptoms

principle of guarantee of trustworthiness, for they are not naturally caused by
 the existing pain or other symptoms, but being deliberate accounts of past occur-
 rences,

to the

toms, and

ed in the same way. *Wignmore* § 1722.

Clause (3) This clause is intended to apply to cases in which the state-
 ment is sought to be used in evidence otherwise than as an admission, for instance

explaining an

inadmissible

by reference

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is relevant

11, clause (1), as inconsistent with a rele-
 prisoner's innocence by circumstances

they will be excluded as
 So also "care must likewise
res gestae The language

N 91-25 C 210, where the defendants

1 which they obtained under a parti

he plaintiff and denied the said partition

sly made by them, which went to show

that there had been a partition and they had changed their attitude could be

proved as against them and the statements were admissible evidence under

sections 21 (3) and 11 (3) of the Evidence Act An admission may be proved

on behalf of the person making it under section 21 clause (3) of the Evidence

Act if it is relevant otherwise than as an admission If self serving statements

are made in the presence of the opponent, and not denied by him, they are

evidence for this purpose, so in the case of taking accounts, or where the entries

are of a public nature (ss 35-37) or

In the case of a house said to have

Raghunath v Briendeshwari L R 5 A 231=83 Ind Crs 582-A I R 1924 All

- Party can show mistake or fraud "There is no doubt that the express admissions of a party to the suit or admission, implied from his conduct are evidence—and strong evidence—against him, but we think that he is at liberty to prove that such admissions were mistaken or were untrue and that he is not estopped or concluded by them, unless another person has been induced by them to alter this condition, in such a case the party is estopped from disputing their truth with respect to that person (and the person claiming under him) in that transaction, but as to third persons he is not bound. It is a well established rule of law that estoppels bind parties and privies, not strangers. See *Bailey J in Hearn v Rogers*, 9 B & C 580. The person against whom an admission is proved is at liberty to show that it was mistaken or untrue. When an admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue there is nothing in the Evidence Act and there is no general principle or rule of law to prevent the Court from deciding the case in accordance with it. See *Mysa v Ma Pha U B R* (1897 1901) Vol II, 377. An erroneous admission does not bind the person making such admission. *Mangin v Shivanant A I R* 1923 All 575. When a petition there is an inadvertent admission as to the nature of certain property it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement. *Dinabai v Ma in lat* 52 Ind Cr 113. Statements made by a party at a previous proceeding without any definite knowledge of his rights and liabilities do not operate as an estoppel. Where the previous proceedings were compromised at an early stage without any decision of Court the party can show in a subsequent suit that the statement previously made was untrue. *Mahomed v Pir Mahomed* 65 Ind Crs 363 = 1 I N 1923 Nag 67.

Statements Post Litem Motam If the analogies of other exceptions be followed [vide clause (5) section 12] all statements made post litem are to be rejected as untrustworthy. But it is questionable whether an absolute exclusion based on this distinction is either just or necessary. 11/1/1971

Illustrative cases—Admissible evidence Where in a suit for mortgage
 the defendant admits the execution of the document he also admits the value
 of the consideration *Sith Nijamul v Dalbhorlal*, 21 N L R 40=47 C L J
 229=107 Ind Cas 113=A I R 1938 P C 89 The fact that a co-defendant
 took part in certain *baluara* proceedings in which the land in dispute was
 measured and a map was prepared is inadmissible in evidence though it is not
 defendants who claim under an in
 90 Ind Cas 613=A I R (1936) C L J 296
 the accused under s 312, Cr Pro Code prematurely at a time
 sufficient to co-act with the crime, with the commission of which
 charged, had been wrong in a
 when it was impossible
 enabling them to explain any circumstances
 still their statements actually made cannot, if apparent, be and voluntarily
 given, be rejected as inadmissible in evidence on account of this irregularity of
 procedure; and that *prima facie* as admissions, these statements were relevant
 under section 31 of the Evidence Act *Queen Empress v Naranjan*, 12 N
 Cr C 679=Cr Rg 15 of 1893 The statements of an accused person, from
 which his guilt may be inferred are admissions and may be proved under
 section 21 *Nay Mal v Empress* 3 P R 1880 Cr *Mt Mehro v Crook*, 8 P R
 R 1907 Cr =5 Cr L J 182, *Haroon v King Emperor*, 8 O C 335=2 Cr
 L J 811, *Nga Po v King Emperor*, 5 Cr L J 360

Illustrative cases—Inadmissible evidence Under section 21, a Court is bound to receive in evidence admissions of a party but no such rule applies to denials. *Janki v. Emperor* 49 A 482—25 A L J 337—A I R 1927 All. 383. A statement in an order for delivery of possession as to the rent payable in respect of the land is inadmissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute. *Chandra Mohan v. Sheikh Elm* A I R 1926 Cal 415—87 Ind Cas 512. An admission by an agent in favour of his principal cannot be relied on by the latter to prove his title to property. *Maula Baksh v. Jafar Ali*, 4 Lah L J 437. A respondent's admission in a divorce suit is not evidence against a correspondent. *Gordon v. Gordon*, 53 P R 1870. A party's income-tax paper may be used against him but not in his favour. *Shah v. Emamun*, 11 W R 275. A party cannot use in his own favour an admission by his predecessor in his own interest. *Bijoy v. Kalipada*, 20 Ind Cas 78—17 C W N 1013—18 C L J 347.

22. Oral admissions as to the contents of a document are

When oral admissions as to contents of documents are relevant, not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

Origin of the rule In evidencing the contents of a document, it has at least, his oral accounted for as advanced in early

English rulings, in a forceful opinion, *Parke B*

declarations were for with that mentioned in the schedule, although such admissions involved the contents of a written instrument, not produced, and I believe my Lord Abinger, who was not present at the argument, entirely concurs. Indeed, if such evidence were inadmissible, the difficulties thrown in the way of almost every

party himself admits to be true, may reasonably be presumed to be so: The

an unprofessional or ignorant man may be led to believe it may be so and so, where the real and true meaning may be the very reverse or something very

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A I R 1925 Pat. 68

Party can show mistake or fraud "There is no doubt that the express admissions of a party to the suit, or admission, implied from his conduct are evidence—and strong evidence—against him, but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter this condition, in such a case the party with respect to that person (and their but as to third persons he is not

privies, not strangers' *Pir Bailey J* in person against whom an admission is mistaken or untrue When an admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue there is of law, *Mysa v*

does not bind the person making such admission' *Mangru v Shivanand*, A I R 1923 All 570 When in a petition there is an inadvertent admission as to the nature of certain property, it is open to both sides to give evidence as to acquainted with the *bandhu v Mammal* proceeding without operate as an estoppel by stage without any decision of Court, the party can show in a subsequent suit that the statement previously made was untrue. *Mahamed v Pir Mahomed* 65 Ind Crs 363 = 1 I R 1922 Nag 67

Statements Post Latem Motam If the analogies of other exceptions be followed (*vide* clause (5), section 32), all statements made *post litem motam* are to be rejected as untrustworthy But it is questionable whether an absolute exclusion based on this distinction is either just or necessary *Hignior* 1731

Where in a suit for mortgage document he also admits the receipt *Moorital*, 21 N L R 40 = 47 C L J 222 = 107 Ind Crs 113 = A I R 1928 P C 39 The fact that a co-defendant took part in certain *baluara* proceedings in which the land in dispute was measured and a map was prepared in which the plaintiff's title was admitted is admissible in evidence though the defendants who claim in 90 Ind Crs 613 = A I R the accused under s 312, sufficient to connect them with the crime, with the commission of which it is held that although the Magistrate 342 Criminal Procedure Code

under section 21 of the Evidence Act *Queen Empress v. Narayan*, 1883 Cr C. 679 = Cr Rg 15 of 1893 The statements of an accused person, from which his guilt may be inferred are admissions and may be proved under section 2 *H. Mehro v Crown*, 8 P W R. 1907 *perior*, 8 O C 205 = 2 Cr L J 811

is party tendering them is with-
out admission assumes a degree
to possess as of a construction
Judge may direct the docu-
F & P 673, *Boulter v. Peplow*.

S. 2

J. C. B. 133) *— 1 sup Ev 226*

Scope of the section This section departs from the English law as laid
down in *Slatterie v. Pooley* 6 M & W 664 Following Mr *Taylor*, the
views expressed in *Laurens v. Oucale* 1 Ir L R 352 has been adopted in the
present Act Oral admissions as to
provided in this section are excluded
statements as to such matters, are how

Cur Li 140 So when the existence conditions or contents of the original
have been proved to be admitted in writing by the person against whom it is
proved or by his representative in interest, such written admission is admissible
Section 6, clause (b) But written admission mentioned here must be distin-
guished from written admission made under section 58 This section does not
exclude admissions which the parties or their agents agree to admit at the

S B H C R A C J 163 (165) Oral admissions as to the contents of a
document are admissible when the party is entitled to give secondary evidence
of the contents of such document under sections 65 and 66 of the Act Such
admissions are also admissible when the genuineness of the document produced
is in question "Where the question is" says *Norton* "not what are the contents
of a document, but whether the document itself is genuine—that is, in the
handwriting of the party whose writing or signature it is alleged to be—evidence

of the document produced is in question The effect of the last clause of
this section seems to be that if such a document is produced, the admission
of the parties to it, that it is or is not genuine, may be received *Nort Ev 153*
Even where the contents of a document may be established by admission they
cannot
can the
be so pro
is not necessary *— 1 sup Ev 226*

Oral admissions of contents In
79—13 C L R 271 *their Lordships*

money is lent on terms
and, the lender suing
promissory note If
promissory note is
a case indepen-
3 (182)—A. W. N
da v. Alhoychurn,

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of sections 91,
denied that it
See also *Damo*

Rule in t
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23. final judgment a former action against the defendant. The Court used the following language. The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are in all cases, admissible in evidence against him though such statements and admissions may involve what must necessarily be contained in some writing deed or record. Thus the statements of a party though the conveyance the production of written admissions of parties as what a party admits against himself may be reasonably taken as true. The weight and value to the statements and admissions will vary according to the circumstances and must be determined by the jury. *Smith v Palmer* 6 Cal (Mass) 513. So the admissions of a party have been received to prove the contents of letters and of a deed. *Loomis v Wadham* 8 Gray (Mass) 501, the existence of a partnership, 63 Pa 374, the terms of a will and the contents of a telegram. On the other hand there have been cases where the declarations of a party or their point out the danger of mistake or misconception as to the terms of written evidence and also the danger of falsehood or fabrication and the difficulty of detection and the danger of following record titles to be lost by mistake only so uncertain in character. They lay down the rule that admissions rank only with oral testimony and that unless made in open Court, they are competent only where parol evidence would be admissible to establish the same fact. *Hallbert v Fletcher*, 22 Ark. 453, *Burns v McElroy*, 11 Ark. 23, *Flournoy v Newton* 8 Ga. 306, *Burr Jones* § 209.

23 In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

Principle of exclusion on principles which examination it would be satisfactory. It would be the principles laid down

It is not to be 209

character has always been excluded and the rule has been so broad as to exclude all admissions thus made. Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money or other valuable consideration with a view to a compromise of the matter in controversy. It must be permitted to men to endeavour to buy their peace without being

prejudiced by a rejection of their offers. Hence, evidence of such offers or proposals is irrelevant, and they are not to be taken as admissions of the legal liability of the party making them. But here a distinction exists between the cases of an offer to pay money to settle a controversy, and an admission of particular facts, connected with the case, made by a party pending a negotiation for a compromise. The more convenient rule might have been that which is applicable to communications between client and attorney, excluding as testimony, everything communicated in this relation, which rule, if applied here, would exclude every admission made during the interview which was had for such compromise. To some extent this rule was attempted to be introduced, excluding all admissions of the parties, even admissions of particular facts, where it appeared that they were expressly stated at the time 'to be made without prejudice'. But the exception was soon introduced, that the evidence was competent where it was the admission of a collateral fact. This theory is consistent enough with general theory of privileged communication, (vide ss 126 129) namely, that expeditions and extra-judicial settlements are to be encouraged and that privacy of communication is necessary in order to encourage them, and there is indeed a privilege for a party's statements to an official conciliator. In policy however it may be doubted whether the recognition of

S. 2

that the supposed privilege does not fit the rule of law as it is everywhere accepted and applied. *Wigmore* § 1061(a)

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entered into any contract by it if the offer contained in it is not accepted. Similarly *Landley L J* in *Walker v Wilsher*, L R 23 Q B D 335, said "What I think they mean, if the terms he accepted, without prejudice, This theory contained in be used for its it contain the express words 'without prejudice', may still be inadmissible in evidence and conversely". *Wigmore* § 1061 (b)

Taylor § 793 'The essence of an offer to compromise is, that the party making the offer Thomson v Austen, 2 Drol & Ry 358, 361, 'is that the party making the offer Money paid upon

23. final judgment a former action against the defendant. The Court used the following language: "The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are in all cases, admissible in evidence against him though such statements and admissions may involve what must necessarily be contained in some writing declared or recorded."

"... as the best evidence does not apply to the admissions of a party as what a party admits against himself may be reasonably taken as true. The weight and value to the statements and admissions will vary according to the circumstances and must be determined by the jury." *Smith v Palmer* 6 C. 4 (Mass) 513. So the admissions of a party have been received to prove the contents of letters and of a deed [*Loomis v Wadham*, 8 G. 4 (Mass) 501], the existence of a partnership based on a written contract (*Eduard v Ira* 62 Pa 374) the terms of a lease in writing [*Palmer v Palmer* (N. H.) 111].

1. It points out the danger of mistake or misconception as to the terms of written evidence and also the danger of falsehood or fabrication and the difficulty of detection and the danger of following record rules to be lost by testimony so uncertain in character. They lay down the rule that admissions rank only with oral testimony and that unless made in open Court, they are competent only where parol evidence would be admissible to establish the same fact. *Hallberton v Fletcher*, 22 Ark 453. *Bucus v McLeroy* 11 Ark 23, *Flournoy v Newton* 8 Ga 306, *Burr Jones* § 208.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

covered by this section are excluded recently by different Courts. But on explanations are more or less unsatisfactory the cases and to try to find out whether satisfactory.

Principle analogous to that of privileged

When an

the usual way by which the privilege is by stipulating that the

Ibid In *Dickinson v Dickinson*,

The rules of evidence, exclude to

of a party. Thus, the more fully to protect the rights of parties litigating all their communications with counsel are held to be privileged. Evidence of this character has always been excluded and the rule has been so broad as to exclude all admissions thus made. Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money or other valuable consideration with a view to a compromise of the matter in controversy. It must be permitted to men to endeavour to buy their peace, without being

for granted, not because they are true, but because good policy constrains the temporary yielding of them to effectuate a greater good, is not admissible, truth being the object of evidence." "The preliminary question always is," says *Dor U J* in *Colburn v. Colton*, 66 N H 151, 156, "not merely whether an admission of a fact was made during a settlement or negotiation, but whether a statement or act was intended to be an admission. It is a question, not of time or circumstances, but of intention." So it is apparent that the occasion of the utterance is not decisive, that is, it may or may not have been accompanied by a reservation or an injunction of secrecy, and it may or may not have occurred during negotiations for a settlement or a compromise. What is important is the form of the statement whether it is hypothetical or absolute. If, making all implications from claim will a therefore the pl claim is abs occurrence in the course of compromise negotiations or in other words a concess-

trans v Small, 1 M & M 449 An offer of compromise, in the sense of a peace offer, may be made by an where the authority of the alleged agent for example, a wife acting for her husband will be rejected *Chamberlayne's Ev.* § 1448 An offer to compromise might be very well made, without restriction as to confidence *Ibid* So also to pay money by way of compromise with a view to buy peace is not evidence *Jetton*, 4 C. P 461, *Gregory v Howard*, 143; *Furner v Barton*, 3 Esp 474, *on v Benson*, 1 P Wms 495 In *Isie* was whether a written notice sent by a had suspended or was about to suspend be written "without prejudice" was inadmissible in evidence to prove an act of bankruptcy upon the hearing of a bankruptcy petition In admitting the petition *of a Paulan Williams v said 'It prejudice' with anot*

23. See also *Grace v Baynton*, 21 Sol Jour 631. But now the question is whether the same rule applies in India also. Such a question arose in *Bombay* *Madhabrao v Gulab*, 23 B 177. In that case the defendant pleaded limitation. In reply the plaintiff relied on an acknowledgment of the debt by the defendant. The alleged acknowledgment was written on a post card sent by the defendant by the plaintiff. It was in *Gujrati* and was as follows:—"I was bound to send Rs 30 according to my *taula* (fixed time) but on account of the receipt of the intelligence of the death of my father I have not been able to fulfil my promise. But now on his obsequies being over, I will positively pay Rs 30 to *Sant Meruaji's*. You, Sir, should not entertain any anxiety whatever in respect thereof. As to whatever debts may be due by my old man, I am bound to pay the same as long as there is life in me. Therefore I write without prejudice and they disagree that even if acknowledged by limitation observations evidence. To exclude it from evidence it would be necessary to hold that the words 'without prejudice' amounted to an express condition that the card should be admissible in England apparently the card of *Vougan J* in *In re Dainary*, quoted, are not, as the Subordinate Judge in the Court of first instance supposed, mere *obiter dicta*. There are documents marked 'without prejudice' has in dispute or negotiation with another, and the dispute or negotiation. This rule is to be found in many cases.

"Probably a person may make his demand being proved at a time for until the claim is not only to enable negotiations to be entered into to settle an existing dispute. A document marked 'without prejudice' but which contains the terms be not accepted, can be admitted. See *Spence*, 58 L T 433 = 57 L J Ch 200. In an anecdote of a young attorney who has always brought an action for breach of promise of marriage against him. When his letters

he merits of the cause and her means. For the purpose of the parties, a letter written without prejudice prevents it being read at the trial (*Patterson v Forrester* 33 Key 33). *Forrester*, has even testified clearly and privilege. *Peacock v Harper*, 26 W. R 109, *Oliver v Nautilus Steamship Co* (1903) 2 K.

B 639, *Powell* 293 The same rule is applicable in the case of conversations unless there be a clear break between the conversation which is clearly *without prejudice* and subsequent conversation no admission of a party in the latter part of the conversation can be given in evidence *Thompson v Austin* 2 Dowl. & Ry 361 Correspondence marked "without prejudice" can be seen in *Waller v Wilsher*, 23 Q B awarding costs. *Ibid* They are marked "without prejudice" In re *Duntrey* (1893) 2 Q B 116: *Pracock v Harper*, 26 W R 109. the statements made during It is ordinarily against public A conviction based on such *superior*, 11 C W N 26 N, see a dispute between two parties.

446), or where an agreement, though purporting to be a compromise, has been finally concluded (as, where it *Erognell v Leuclyn*, 9 Pr 122, 20 C. W N. the plaintiffs 1217. Where certain letters were it prejudice' and the defendant's

under s 23 of the Evidence Act regards the letters it must be intended to claim the same 6 O W N 1088=A I R 1930 Oadh 193 Section 23 is no bar to the use of admission in compromise which is not rejected *Sadhu v Botha*, 11 L L J. 446=A I R 1930 Lab 293 In *Healey v Thatcher*, 8 C & P 398 *Gurney* H excluded a letter beginning *ddock v ally M. empt to Thomas, Jordan adverse party with a view to a compromise, or to an action, you must look with very*

intention to admit liability to the extent of the claim" *Mearns v Amman*, 11 C 130=20 C W N. 1217=25 C L J 12

24.

Facts admitted can be proved by the witness "the question in the defendant, of money on compromise" and therefore to be admissible. *Thomson v. Austin*, 2 Dowl &

148 = 4 Pat L J. 676 = (1920) Pat 52.

which the Court can infer, etc This section and the words "infer that it was the intention of the parties agreed together that" in England there has been some difference of judicial opinion as to whether

be drawn almost as a matter of course from the nature and circumstances of the case" *Wills' Ex 299* This difficulty is further more obviated by the words used in the section

Explanation The explanation refers to the obligation on the part of Barristers and others to answer questions as to professional communications made to them in furtherance of a criminal purpose or as to any fact observed showing the commission of a crime or fraud since the commencement of their employment *Cun Ex 141*

Illustration 1. A barrister is asked a question as to whether he has seen a person to

it is for the Court dealing with the proper to such an admission *Punjab Singh v. Ramantur*, 52 Ind Cas 111. Admission made by the tenant defendant before the pleader of the plaintiff landlord, to whom one of the defendants went before the suit for compromise is admissible in evidence in the absence of any express or strongly implied condition that evidence of the same would not be given *Morgan v. Almond*, 20 C W N 1217 = 44 C 180 = 341 A. 571.

A I. R. 1926 Lah 509 = 92 Ind Cas 319

24

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from

Confession caused by inducement, threat, or promise, when irrelevant in criminal proceeding

a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him

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defined in the Indian Evidence Act" says *Mahmood J* in *Queen Empress v Babu Lal*, 6 A 509 (1 B) at p 539, "it, however, occurs under the category of admissions, and to make my meaning clear, I adopt the definition given by *Mr Justice Stephen* in Art 21 of his *Digest of the Law of Evidence*, by saying that a 'confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime' In *Queen Empress v Jagrup*, 7 follow the definition given "was written in view of a pre

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and
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out the spot to the effect that he
whether those statements amounted
23 Held that the above statements
as they suggested the inference that
not intended by the accused, as a

confession of guilt they were an admission of a criminalizing circumstance and would form a very important part of the evidence against the accused in showing

Evidence Act makes a clear distinction between an admission and a confession. It is only under s 3

accused persons jointly
as against the rest

affect both the person confessing, and the crime confessed. As held by the *Yesuada* taken by themselves do not fall within that category. As held by the Allahabad High Court in *Emperer v Jagrup*, 7 A 646, the word 'confession' must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt. Section 30 must be strictly construed. The learned Sessions Judge has construed the statement into a confession by a process of inferential reasoning which is not what the terms of section 30 countenance. See also *Emperer v Nani Gopal*, 15 C. W. N 593 (612) = 33 C 569

In *Queen v. Mac Donald*, 10 B L R App 2, *Phcar J* observed that there is a distinction in the Evidence Act between admissions and confessions, but the judgment contains no definition of the term. This case was followed by

24. *Prinsep J n.*

the subject
Tribhovan M

statements which it is proposed to prove against an accused person to establish an offence or in other words what admissions do amount to confession, remained unanswered

Mullik, 15 C

meaning of

between admission and confession In *Queen Empress v. Nilmadhob*, 15 C 335, *Petharam C J* also said at p 607 "If the contents of the document did not

amount to a confession relevant as an admission the learned Chief Justice

under s 21 of

admitted the existence of confession and confession but did

not give any definition of the word 'confession'. The High Court of Madras is

silent on this point

reported Madras

sion" one should

Empress v. Jagann

the Law of Evidence

time by a person

committed the crime

26 Ind. Cas. 161

ting the guilt; a

committed the crime

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of the Law

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admission made at any time by a person

ing the inference, that he committed that

which amount to a direct acknowledgment

inculpatory statements which although they are not such as to amount to a confession

of guilt, yet suggest an inference of guilt or from which an inference of guilt

follows. The factor determining whether a statement amounts to a confession

is not the fact that it leads to an admission but the fact that it leads to an

admission. *Tha v. Emperor*, 5 L. B. R. 131-132

10 P. R. 185 Cr

ing the inference that he committed the crime

P. L. R. 1905=20 P. R. 1905 Cr; *Queen Emp*

(707), *Superintendent v. Lalit Mohan Sengupta*,

In *Queen Empress v. Jate Charan*, 19 II 363

him; it was no admission whatever of criminalizing circumstances. It was there-

fore, inadmissible. The statement held to be inadmissible in *Imperatrix v.*

Pandharinath, 6 II 31 was of a different character

admitted possession of a cheque alleged to

one of the criminalizing circumstances which

against the accused. In the present case the statement does not amount to an

or indirectly, to an admission of any criminalizing circumstance, and is, therefore,

outside the principle of the ruling cited." "In the result," says *Carnell J.*

Barindra Kumar Ghose v Emperor, 11 C W N 1114 at p 1197-37 C 167 "it seems to me that each case must be decided as it arises with reference to the question whether the particular statement concerned, whether it be positive or negative, verbal or expressed by conduct, is or is not a confession. See also *Muthu Kumar Suami v King Emperor*, 35 M 397; *Emperor v Cuna*, 22 Bom L R 1247, *Ganapati v Emperor*, 6 N L R 180-12 Cr L J 60-8 Ind Cas. 1181 "By confession I understand not necessarily a full confession of guilt, but any statement made which, being relevant to the issue, may be put in evidence against the person making it" *R v Wong Chin Kai, Roscoe, Cr. Ev 37* Confessions of other crimes not relating to the charge *e g* showing or admitting a general tendency even to the crime charged, are inadmissible *R v Cole*, 1810, *Roscoe, Cr. Ev 37*

In *Smith v Emperor*, 13 Ind Cas 605, at p 611, *Phillips J* said "There is no definition of confession in the Evidence Act but I take it that it must be something more than a mere admission. In *Emperor v Kangal Mahi*, 26 Ind Cas 161-15 Cr L J 713-11 C 601 when dealing with the admissibility of statements, it . . . they were put . . . of the accused . . . be found to amount to confessions. Accepting both these propositions I would add that in order to make . . .

... making, I am doubtful whether the fact that it does become incriminating owing to subsequent events would make it a confession" See also *Pan Gong v Emperor*, 19 Cr L J 42; *Jasoda v Emperor*, 53 Ind Cas 691.

An admission of all the ingredients required to constitute an offence is a confession. A confession is an admission made at any time by a person charged

... recovered stolen articles from the house of the person making the confession and from the persons named by him, held, that the confession was not rendered untrue merely because the person making the statement minimised his share in the dacoity. 126 Ind Cas 498-31 Cr L J 1017-A I, II 1931 Oudh. 74 A statement of the following . . . sion of complicity in an offence "I told . . . kill my husband, they were at liberty . . . against them. But when they arrived at . . . I endeavoured to restrain them and was . . . threats to kill me and my son if I . . . in the murder, nor did in any way assist the murderers after my husband was put to death" *Bhag Singh v Emperor*, 4 Ind Cas 429-21 P W. R 1909 Cr-153 P. L. R 1909 A statement of an accused to the effect that under threats of death he was forced to sit outside the

Gul Hossain v Crown
A confession must
state in law the offence

... 133 Where the complainant, it is . . . for the Magistrate to treat the circumstance as an indication of the accused's guilt. In *re Abdul Rahman*, 4 L W 556-17 Cr. L J 462-36 Ind Cas 142 To constitute a 'confession' under the Evidence Act, it is not necessary that the person confessing should make a full and explicit . . .

24. of his guilt so clean as to leave no other hypothesis tenable. *Smith v Empson*, 43 Ind Cas 605-19 Cr L J 189 The fact that the accused did not claim a piece of cloth as his own before the Police but admitted at that time that it belonged to the deceased might have been due to this that the defence is not

judicially case by judicial admission is in the case of the accused, 1929 Cal 539

Confession, meaning of--English Law Stephen defines that "a confession with a crime, stating or If the words 'any time' time they seem too wide

■ K B 108 *Phipps* 255

Confession, meaning of--American view The general rule that a confession, a statement by one accused of crime directly or by necessary inference admitting his guilt, is receivable in evidence, provided it complies with certain requirements of procedure, is not questioned in any quarter. It necessarily follows from the very definition of a confession that it must, as a total, incriminate the declarant, as to the crime charged in the indictment. But while every confession must be an incriminating statement, it by no means necessarily The confession confession as to to the knowledge or not conceded,

"A confession in a legal sense is restricted to an acknowledgment of guilt made by a person after an offence has been committed and does not apply to a mere statement or declaration inferred." *State v Reinhard* Ev § 1476; *Wigmore* § 821 that an acknowledgment an inference of guilt is properly design

of facts which could be true whether the main fact existed or not" *Puley v* State, 1 Gr difference the main fact admitting with innocent or subordinate fact or marked

On the other hand, the term confession has been strictly confined, by Court, to distinct concessions of liability, nothing being left to inference. So "to constitute a declaration a confession within the legal meaning of the term it must amount to a confession of the crime charged, or participation in

such commission, as distinguished from admissions or other statements tending to prove guilt or innocence, or of facts from which, taken together, guilt is directly deducible" *Encyclopaedia of Evidence*, Vol III, ¶ 298 S. 2

Confession . . .
of admissions,
a criminal charge
exists and a special rule based on the general testimonial principle of trustworthiness exists, and a special rule, based on the general testimonial principle of trustworthiness of narration, becomes applicable. That rule satisfied, the confession occupies the status of ordinary admission; its relation to other rules of Evidence is therefore determined by its quality as an admission. For example, as an extra-judicial statement, it would ordinarily be obnoxious to the Hearsay rule but admissions are either not within the prohibition of that rule, or are an

law that it will not force any man to accuse himself; pain and force may compel men to confess what is not truth of facts, and consequently such extorted

Gilbert Ev 6th Ed (1801) p 123,

Wainwright, 8 A & E 691 (700),

Wills' Ev 2nd Ed 150, Taylor §

ived on the same principle as that

d, viz, the presumption that a

against his own interest *Taylor §*

K B 346 So it is clear that

Hearsay exception for statements

to day be so regarded, where the accused, not being compellable, fails to take the stand *Vide section 32, clause 4 and notes thereunder; Wigmore § 816 (Foot*

note) As in the case of admissions, certain vicarious admissions, i.e. those of agents and other persons are often receivable, so also in the case of confessions,

the confessions of co accused, co conspirators, and others are also receivable. *Wigmore § 816*

matter begins to be considered, and it is recognised that some confessions should

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suspicion of all confessions
to repudiate them upon the

of changing the law or the practice" *Wigmore* § 817.

The Evolution of Reason To a certain extent, the history of the evolution of the law of confessions is that of most rules in the law of evidence. As is said elsewhere the early history of the law of evidence is the history of the law of the witnesses down to the close of the sixteenth century. It was then decreasingly one of administrative law and increasingly one of administrative law. As part of the executive of the crown, the jury was to what they might be practically no rules, certainly none having the force of law. At most the action of the judges in this respect was determined by the custom, or practice of the various circuits of the King's Courts. The effort was to administer the customs of the realm or other provisions having the force of law with legal reasons, as that term was then understood, for the attainment of substantial justice, though, of course, conventional.

In respect to confessions by way of pleas of guilty, the judges made sure that the prisoner was fully aware of the consequences of his plea. The penal code then in force, for comparatively unimportant offences, accused laboured, it seemed but just that before the judge should allow a prisoner to plead guilty without the aid of witnesses, and hurriedly tried, often

not necessarily be taken at his word, he was to be warned and even, occasionally, advised to retract his plea. Of this judicial administration, as of any other, the characteristic guide and test was reason.

The political events of the seventeenth century in England, to which brief reference is elsewhere made, were united with the assumed necessity for concealing valuable judicial legislation, the temper and philosophy of the times and much else, to evolve the use of reason into the direction of establishing rules of law in place of those of practice or administration. During the eighteenth and most of the nineteenth centuries the rules of evidence were being formed. To a very large extent, this development was marked by a change from administration, as represented by the practice on the several circuits, into rules of substantive law relating to procedure. Positive regulation of admissibility of evidence, establishing classes of facts to be received or rejected had taken the place of legal reasoning as freely applied in the administration to the facts of the individual case. It might almost be said that practice had hardened into law. It seemed to the mind of the time that the protection of individual liberty as of the reasoning faculty, that a species of character and the like, which

substantial justice

From this period or stage of legal evolution has come the multiplicity of conflicting decisions, each having the force of precedent, concerning the

and a lively consciousness, that it has been voluntary, naturally, it has value from the moral and substantial perspective of law that all confessions made after a certain time may be referred to the declarant by a signified class of persons shall be respected, for in many cases such statements would be calculated to mislead a jury that was weary of facts, have been many and conspicuous. To a certain extent this evil consequence has been found to attend the operation of voluntary confession which has led to various classes or species of facts regardless of their probative effect in any particular instance even where any alternative process will never be secured in any other way. It has therefore come to be felt that a declaration should be applied to the individual case rather than employed in the creation of a statutory class to which the quality of a confession is ascribed for all purposes demanded by the substantive law relating to procedure. In other words, while the feeling of the last century in favour of having a rule of law which led to the conduct of legal business and the rights and liabilities of procedure on a hypothetical fact rather than a distinction of each particular case, regarding the work of the courts is maintained. Where this rule is the relation to the law of evidence where certainly is important, a rule of law, having no effect of procedure and capable of codification, results from the principle of a confession in any particular case. Should, on the other hand, the confession be a confession, the law of actions, the confession to be attained, the enforcement of the confession, the expediting of trials and the law are to be reached. At this point sound legal reasoning, the flexibility of a legislative action, properly takes the place of the rigid rule of law, the procedure enforcement on appeal. Into this stream of legal evolution, the increasing texture of the element of reason, the modern law of confession is and for some time has been, gradually emerging. *Chamberlaine's J. R.* 28 1917, 1918

Narration as affected by Motives to Confess guilt. The trustworthiness of confessions of guilt has been a constant theme of argument in the administration of justice. From the point of view of logic, the question is whether the confessional narrative is explainable by any motive other than that of a consciousness of guilt arising from actual guilt. Obviously a double inference is involved,—first from the utterance of the confession to a consciousness of guilt as its motive cause and secondly from that cause to the actual doing of the deed. There have been false confessions in every case whether at

the confession to the
ords, of the confession
being a voluntary one, the process was one of choice of motives. If the confession
was a false one,
of utterance with
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es of damaging

gence, his physical condition (hunger, fatigue, fear), and his environment. E.g. in the old English case where (under the then trial rules of Evidence) a confession was excluded because some one had promised the accused a glass of beer if he would confess, we could hardly conceive of ourselves making such a choice of motives; but we might have to believe that this particular man did make it, after we learn all the data about him. So, too, the oft-repeated case

4 in China of a man falsely confessing and implicating the guilty one out of execution, rests on motives which would not be meretricious

between the observers idea of the choice of motives that he would make and the choice of motives that the accused bears what he is, is alleged to have made. And the observer finds it difficult to judge the choice from any but his own experience and standard. The alleged choice of false confession by the accused could have been due only to the dominance of a motive so unlikely and queer (from the observer's experience) that the explanation seems far-fetched and improbable.

Hence the decision in such cases calls for wise acquaintance with the human nature of confession and an estimation of the probabilities that one of the rare or unusual motives is in deed present and dominant in the case in hand! — *Wignores Principles of Judicial Proof* § 222

Same—Motives for confession. 'The confession is a very extraordinary psychological problem. (1) In many cases the reasons for confession are very obvious, the criminal sees that the evidence is so complete that he is soon to be convicted and seeks a mitigation of the sentence by confession, or he hopes through a more honest narration of the crime to throw a great degree of the guilt on another. (2) In addition there is threat of vanity in confession—is among young peasants who confess to a greater share in a burglary than they actually had (easily discoverable by the magniloquent manner of describing the actual crime). (3) Then there are confessions made for the sake of care and winter lodgings. (4) confession arising political criminals and others). (4) There nobility, from the wish to save an intimate such as occur especially in conspiracy the men of the real criminal or for the destruction of in the latter case guilt is admitted only until the plan for which it was has succeeded, then the judge is surprised with a well founded regular and successful establishment of an alibi. (6) Not infrequently confession of small crimes is made to establish an alibi for a greater one. (7) And finally there are the confessions Catholics are required to make in confessional and (8) The death bed confessions. The first are distinguished by the fact that they are made freely and that the confessor looks at the crime, but aiming to make amends, penance. Death bed the desire to prevent person. (9) A number of cases may perhaps be explained through the of conscience persons who are would appear ceases, etc. If the confessor only intends to free himself from the cause

in response to mere pressure, we have a cause of conscience. There is always considerable difficulty in explaining these cases. To deny that there is is comfortable but wrong, because we each know collection of cases in which no effort can bring to light a motive for confession. The confession is made because the confessor wanted to make it, and that is the whole story. *Wignores Principles of Judicial Proof* § 223 citing from *Hans Gross*, Criminal Psychology.

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confessions are either rough mistakes are the mistakes a corpse for finding the body of the

but to a man known that legally he is not guilty. (*R v Unbillee*, 5 C 20, New York, 11 C 401.) In a state where confessions are intentionally made to escape a victim and this includes all those false confessions which are extorted from a prisoner by ill-treatment or torture. A second motive is a desire to settle a quarrel which may be illustrated by the case of a man falsely accused of a young woman's seduction. Equally a confession to throw off a prisoner's suspicion of a recent crime, in which he has already committed a third crime, is a confession of a second crime. A fourth motive, originating in the relation of sexes, is thus illustrated by the case of a woman originally indicted for the wife of a thief's disquisition—"In the relation between the sexes, says the great writer on false evidence, "may be found the source of the most natural examples of this as of many other eccentric habits. The female unsexed punishment as for seduction hazarded the reputation, and a husband's duty, for the purpose of keeping off rivals at the same time, and the alliance. The female matron—the like impudently even though innocent married with a view to marriage through her son. A fifth motive is vanity. Bentham takes the following extract from *Bentham*—"Vanity will in the use of any other motive, has been known (the force of a moral sanction being in this case a little against itself), to afford an interest strong enough to engage a man to sink himself in the good opinion of one part of mankind under the notion of raising him self in that of another." A sixth motive is the fear to benefit others. A seventh motive is the desire to injure others, this is the crime and a poor revenge has frequently been the expense of their own peace. (*11 pp 11* 18, 8, also see *art 1m 11 1203 & 60—573*, *Haymore's Principles of Judicial Proof* § 223)

not a
found
an habitual criminal) the confession was of guilt of a serious crime, plus the
nervous strain of avoiding detection led naturally to a confession upon being
depressed and arrested.

The process is one of a suddenly relaxed inhibition. Upon doing a heinous act the person is conscious of an emotional shock at violating common morality and at finding himself in danger of punishment and ruin upon discovery. He therefore now inhibits every form of conduct that could reveal his guilt. The next restraint of these multiple inhibitions accumulates hourly and is not

So all the inhibitions
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A flood of normal nervous consciousness returns. A
full nervous relief is felt—equal to the physical relief given by a purgative after
long constipation. There is no longer any strain of inhibition. And the

At this condition, however, [infrared] absorption of [the material] remains

reasonable hope of escaping discovery; *Impress v Dade Ind.*, [15 B 452 (479)].

and half savage nature of the accused (*Taylor's Trial of cases*, para 135 cited

24 in China of a man falsely confessing and implicating the guilty one out of execution, rests on motives which would not be merited between the observer's idea of the choice of motives that he would make and the choice of motives that the accused, being what he is, is alleged to have made. And the observer finds it difficult to judge the choice from any but his own experience and standard. The alleged choice of false confession by the accused could have been due only to the dominance of a motive so unlikely and so queer (from the observer's experience) that the explanation seems far-fetched and improbable.

Hence the decision in such cases calls for wide acquaintance with the human nature of confessions and an estimation of the probabilities that one of the rare or unusual motives is in deed present and dominant in the case in hand.—Wigmore's *Principles of Judicial Proof* § 222

Same—Motives for confession. 'The confession is a very extraordinary psychological problem. (1) In many cases the reasons for confession are very obvious, the criminal sees that the evidence is so complete that he is soon to be convicted and seeks a mitigation of the sentence by confession or he hopes through a more honest narration of the crime to throw a great degree of the guilt on another. (2) In addition there is thread of vanity in confession—is vain young peasants who confess to a greater share in a burglary than they actually had (easily discoverable by the magniloquent manner of describing the actual crime). (3) Then there are confessions made for the sake of care and winter lodgings. The confession arising from 'firm conviction' (as an ongoing confession arising from

of the real criminal or for the destruction

in the latter case guilt is admitted only until the plan for which it was has succeeded, then the judge is surprised with a well founded regular and successful establishment of an alibi. (6) Not infrequently confession of small crimes is made to establish an alibi for a greater one. (7) And finally there are the confessions catholics are required to make in confessional and (8) The death bed confessions. The first are distinguished by the fact that they are made freely and that the confessee does not try to mitigate his crime, but aiming to make a penance. Death bed the desire to prevent person. (9) A number of cases may perhaps be explained through reason of conscience, persons who are would appear ceases, etc. If the confessor only intends to free himself from the

terms of confession, we are not but more or less with ease where such hallucinations are the confession is made freely

in response to mere pressure, we have a crucible of conscience. There is also considerable difficulty in explaining these causes. To deny that there are such is comfortable but wrong, because we each know collection of cases in which no effort can bring to light a motive for confession. The confession is made because the confessor wanted to make it, and that is the whole story. (Criminal Psychology) Wigmore's *Principles of Judicial Proof* § 223 citing from Hans Gross

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charge . . . According to the rules of evidence, what a person says and respecting a particular fact is amissible evidence, not in the nature of a confession, but as evidence of the particular fact.' 'The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement but based upon the substantive differences of the character of the evidence derived from each. A confession is a direct acknowledgment of guilt on the part of the accused, and, by the very force of the definition, excludes an admission which, of itself, as applied in criminal law, is a statement by the accused 'direct or implied' of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt but of itself is insufficient to authorize a conviction.' *Per H. L. J. in State v. Gure*, 50 Mont. 125-126 Pac. 329.

What are confessions and what are not confessions were very lucidly explained by H. L. J. in *State v. Price*, 32 Or. 15-19 Pac. 904 (1st) where he said: "We take it that the admission of a fact or of a bundle of facts, from which guilt is directly inferrible, or which within and of themselves import guilt, may be denominated a confession. But not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts admitted involve a crime, and therefore port guilt, or as put by Mr. Wharton, 'I am guilty of this', and "this" imports the admission of all the acts constituting guilt. It is necessary however, that the accused should speak with an *animus confitendi* or an intention to speak the truth touching the specific charge of guilt and when he with such intention, narrates facts constituting a crime the guilt becomes a matter of inference, a resultant feature of the narration without an explicit declaration to that effect. So that we conclude that whenever the statements or declarations of the accused, voluntarily made, are of such facts as involve necessarily the commission of a crime, or in themselves constitute a crime then the facts admitted import guilt, and such admissions may properly be denominated confession." So it is admitted on all hands that there is a distinction between admission and confession. *R. v. Macdonald*, 10 B. L. R. App. 2, *Empress v. Debee* Pre. 1, 6 C. 530-7 C. L. R. 531, *R. v. Duthie* 3 N. L. R. 51-5 Cr. L. J. 131, *Emperor v. Mithomei*, 5 Bom. L. R. 312, *R. v. Gopal*, 7 C. 95-5 C. L. R. 171, *R. v. Chooramoni*, 11 W. R. Cr. 25, 26, *R. v. Jay Gomar*, 2 C. L. R. 62, *R. v. Meher Ali*, 15 C. 593, *Empress v. Nilmathab* 15 C. 595 (607), *Q. v. Jaffir Ali*, 19 W. R. Cr. 57 (62); *Faju Pramanik v. Empress*, 25 C. 711, *R. v. Hurnibole*, 1 C. 207, *Harris v. Emperor*, 1 L. R. 1927 Lah. 650.

Confessions—Division of. Confessions may be divided into two classes—Judicial and Extra-judicial. *Rowce* Fi. 37. Judicial confessions are those which are made before the magistrate, or in Court, in the due course of legal proceedings, and it is essential that they be made out of the free will of the consequences of the

as a complainant.

Magistrate, or in Court, this term embracing not only explicit and express confessions of crime but all those admissions of ions of this kind be weighed by itself to supply it. *Cr. Ev.* 7. An the person. *Il.* 7. *Cr.* 69. *Il.* 7. *R. v. Gopal*, 7 C. 95-5 C. L. R. 171, *R. v. Meher Ali*, 15 C. 593, *Empress v. Nilmathab* 15 C. 595 (607), *Q. v. Jaffir Ali*, 19 W. R. Cr. 57 (62); *Faju Pramanik v. Empress*, 25 C. 711, *R. v. Hurnibole*, 1 C. 207, *Harris v. Emperor*, 1 L. R. 1927 Lah. 650.

may be in any form. A favo

24 confession may properly be in written form and the accused may either prepare it for himself or adopt it as his when prepared by another. For example, a prisoner's confession taken down by some one else and signed by the declarant is as much his written declaration as would be one prepared by his own hand. As to the manner in which a written confession should be authenticated to the tribunal, no established rule exists. That some authentication is necessary is obvious (*Chamberlayne's Ld* § 1512). In case no written document exists covering the confession, its statement may be proved by the evidence of any person who heard them (*Ibid* § 1571). It may be in the form of a letter (*Booth v R* 15 Cr L J 55=18 C W N 386).

Form of confession writing—Best Evidence Rule. Where a confession has been reduced to writing by the witness and signed by him the document itself is preferred in proof of it being the best evidence. Parol evidence therefore will not be received until the absence of the document has been explained to the satisfaction of the presiding Judge (*Chamberlayne's Ld* § 1573). But when some body else has it down the confession may be proved by oral evidence of some witness who heard it made (*R v Lajer* 10 Win Abr 96).

To whom Extra judicial confession is Made. An extra judicial confession can be made to any person or collection or body of persons (*Harbans v K E* 8 O C 395, *Chanon v Crown*, 21 Ind Cr 468=14 Cr L J 576, *Heslin v Emperor*, 15 Cr L J 502=24 Ind Cr 590). It is not necessary that the statement should have been addressed to any definite individual. It may have been made to a group of persons in authority, upon the great majority of whom it is believed. Though it is in connection with a crime.

confessions so made that they are carefully scrutinized, no reason why what has been said to him even the trial judge are equal voluntary confession by oral statements made, or letters written by the accused, or letters written by the prosecutor (*R v Heat* 69 J P 224), 2 K B 108 where the letter was

Gardner, 85 L J K B 108, against him, if independently proved. And it is immaterial whether the confession was made to a person or to a group of persons. (*Welsh* 3 F & F 261. It is not necessary that it should be received with suspicion, but it must be believed when it is received.)

clear, consistent and convincing. The evidence of an admission of guilt to villagers may be as strong evidence against an accused person as a confession before a Magistrate. It requires no corroboration. The Court must decide whether the persons before whom the admission is said to have been made are trustworthy witnesses (*Mann v Emperor*, 134 Ind Cr 1018=A I R 1931 Oudh 415).

Extra judicial confession—Proof of corpus Delicti as corroboration. Whether extra judicial confessions uncorroborated by any other proof of the corpus delicti are of themselves sufficient to found a conviction of the prisoner has been gravely doubted in England. In the Roman Law such naked confessions amounted only to a *semi plena probatio*, upon which alone no judgment could be founded, and at most the party could only in proper cases be put to torture. But if voluntarily made in the presence of the injured party, or if reiterated at different times in his absence and persisted in they were received as plenary proof (*Greenl Ev* § 217 *Taylor* § 868). In each of the English cases usually cited in favour of the sufficiency of this evidence, some corroborative circumstance will be found (*Ibid*). In the United States the rule is held

receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law. *Greenl. Ev.* § 217; *Taylor Ev.* § 868; *Guilla's Case*, 5 Halst. 168, 145, *Long's Case*, 1 Hayw. 524, 2 Russ. & M. 825, 826.

Weight of confession. The evidence of verbal confessions of guilt is to be received with great caution. For, besides the danger of mistake, from the misapprehension of witnesses, or from the prisoner's expressing his own meaning, that the mind of the prisoner and that he is often influenced by motives of hope or fear to make an untrue

confession, offenders, who persons which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of secret and atrocious crimes, all tend to its rejection, *Ev.* § 214

decided conflict of of confessions. On affirming the slender classical precedents

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judicial confession has been made testimony. Such testimony is often associates, angry victims, and over zealous testimony of these persons the suspicion

Confessions made by signs or gestures Under this head we may group

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A direct confession whenever the spoken or written word could be excluded" Underhill Cr Ev §

141 But where an accused, not shown to have understood English, is asked

responsible for the act and he nods his

act does not amount to confession It is

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remarks addressed to him as to his complicity in the crime and without being

satisfied that the accused exactly understood the meaning and the import of the

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Cr L J 141-A I R 1930 Lih 81

Confession-Test of Truth A true confession made by a person who

takes part in a murder invariably adds something to the knowledge already

possessed by the investigating officer and that is the greatest test of its truth.

Mata Din v Emperor, 132 Ind Cas 228-32 Cr. L J 854-A. I R 1931

Oudh 166

Confession must be taken as a whole When a confession is used against

an accused person, the whole confession must be introduced So where an

accused person makes a confession, the confession is evidence in his favour as

well as against him and must be taken as a whole Queen-Emress v Dada

Ind, 15 B 452, Kairi In re 83 Ind Cas 455-26 Cr L J 1142 Emperor v

1 (F B), Queen v Greathorn, 7

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2 v Sahadu Rik Un Cr C 771,

7, 22 C W N 834; Simras v E

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part which is against him, and disbelieve that which is in his favour R v

Higgins, (1829) 3 C & P 603, R v Cleves, (1830) 4 C & P 221; R v Steptoe,

(1830) 4 C & P 397, Halsbury Vol IX p 398, Taylor § 870, Kamoda v

Emperor, 46 Ind Cas 705 There were earlier rulings to the contrary R v

Jones, 2 C & P 629, Bosanquet Sergeant; R v Lydod, 1 Phill Ev (3rd Ed) 399

In determining whether the statement is true or not, the jury should consider

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24. only for measure is to take confession as a whole *Mannj Po Thin v Queen Empress*, L. B. R. (1872-1893), 321; *Queen-Empress v Elgit*, L. B. R. (1872-1893), 327; *Crown v Summudur*, 4 P. R. 1872 Cr; *Queen v Bishoo*, 9 W. R. Cr. 16; *Queen v Shesh Boodhoo*, 5 W. R. Cr. 33; *Queen v Chala Khan*, 5 W. R. 70; *Queen v Sonapoolah*, 25 W. R. Cr. 26; *Golole v Magistrate of Chittagong*, 25 W. R. Cr. 15; *R v Gour Chandra*, 1 W. R. 16(17); *R v Beshor*, 18 W. R. Cr. 29; *Pila Ben v R*, 16 C. W. N. 1055; *Pulin v Emperor*, 40 C. 873; *Queen v Soobjan*, 10 B. L. R. 332. So a prosecutor is not to be allowed to give in evidence part of a confession made by a prisoner, but it must be put in proof as a whole, so that the jury in one case, and the Judge and the assessors in the other may have the fullest means of testing its accuracy and forming their opinion as to whether the whole or part, and what portion of it, can be believed. For example, if a passage in a statement made by a prisoner standing by itself amounts to an passages quite merely because point *Empre* 1926 Lah 551, Ind Cas 178=

with the general tenor of the confession: *Queen v Nityo Gopal*, 24 W. R. Cr. 80. The mere fact that the accused has been interrupted, and therefore has not stated all that he meant

consequences (1) The prosecution must put in the whole of the accused's statement, including the portions favourable to himself as well as the unfavourable. But this does not prevent the use of statements which are separate in themselves though not forming all the accused's utterances nor of such fragments of a

has a right to lay before the Court the whole of what was said in that conversation of a crime, the full not being confined against him, occasion, *relat*. *Queen's Case*, C. 46 § 5, R. Case, *Leigh* the whole which whole any part the jury for their consideration, precisely as in other cases where one part of evidence is contradictory to another, of a confession are entitled to equal charges the prisoner, and reject that on grounds for so doing. *Q. E. v Jhina Valt*, Rat. Un. Cr. C. 436, *Neq v Lmt*, 10 B. H. C. R. 500; *Kamoda v Emperor*, 19 Cr. L. J. 785 (Nag), *R. v Lmt*, Rat. Un. Cr. C. 370. *Mata Din v Emperor*, 1930 Oudh 113, *Lalsimay v Emperor*, 1930 M. W. N. 785. If what he said in his own favour is not

contradicted by evidence offered by the prosecutor, nor improbable in itself, it will generally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case. (1) And if the confession implicates other persons by name, yet it must be proved as it was made; not omitting the names, but the Judge will instruct the jury, that it is not evidence against any but the prisoner who made it. *Greenl Ev* § 218.

A Judge ought to decide the question of the admissibility of a confession first and should in its ordinary course him and coming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole. *Hasun v Emperor*, 53 Ind Cas 145=20 Cr L J 737; see also *Kamoda v Emperor*, 16 Ind Cas 705=19 Cr L J 785, *K E v Injico*, 15 A L J 15, *Q E v Umar*, Rat. Un Cr. C 371.

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Din v Emperor, A I R 1930 Oudh 113

Uncorroborated confession, evidentiary value of. If there is no reasonable
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6. 24. of an accused person are not subject to an ex unation on oath compelling his

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thus confirmed by the fact is proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to inquire whether the prisoner stated that the thing would be found by searching a particular place and to prove that it was accordingly so found, but it would not be competent to inquire whether he confessed that he had concealed it there. 1 Phil 411; *Warickshall's Case* 1 Leach Cr Cas 293; *Mosey's Case* 1 Leach Cr Cas 301; *R v Gould*, 9 C & P 364; *R v Harris*, 1 Mood Cr Cr 338. This limitation of the rule was distinctly laid down by Lord Ellenborough and that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction. East P C 607; *Harvey's Case* 130, *Green's Case* 231 and delivered them to the jury.

to the prosecutor, notwithstanding it may appear that this was done upon inducements to confess, held out by the latter there seems no reason to reject the declarations of the prisoner, contemporaneous with the act of delivery, and

prisoner, thus improperly induced, and of the information given, by a search for the property or person in question prove wholly ineffectual no proof of either will be received the confession is excluded, because, being made under the influence of a threat, it is not voluntary. The influence was groundless conduct.

Cr L J. 488=12 Ind Crs 96

Where the circumstances of the case compel a tribunal to reject all the other evidence and act only upon a confession the confession must be used *in totum et verbatim*, and due effect must be given to every statement contained therein whether in favour of the accused or against him. *Jagdeo v. Emperor*, 12 A.L.J. 15

The law does not require that the confession of an accused person be corroborated before it can be acted upon. It is for the Court to decide whether it believes a confession or not. *Empire v Dhani*, 52 Ind Cas 581 = 20 Cr L J 721. The fact that the confession was retracted before the committing magistrate would not deprive it of its voluntary character. *Sheo Prasad v Emperor*, 52 Ind Cas 50 = 20 Cr L J 562.

372 Apart from inadmissible in evidence, they are not of such a nature as entitles them to any weight, because it is impossible to ascertain the exact words used by the person. To base a conviction on such a confession is not safe. *De Ry v Emperor*, A. I. R 1928 Lah 558-29 P. L. R 156. The evidence of an admission of guilt to villagers may be a strong evidence against Magistrate. It requires no corroborator.

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prison them down, or by some one else who heard them. In the case of *Munger Bhoojan*, 10 W. R. Cr. 50.

Confession how construed. Where people are so ignorant as the Burmans are, of the an admission the acknowledge.

Circumstances strengthening Testimony to Admissions or Confessions. Among these would be the fact that the confession

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but does not necessarily establish the untruth of the main feature. *Moore on Facts* § 1182.

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Section 164 of the Cr Pro Code and Judicial Confessions. Judicial confessions indicate confessions which are made on a magisterial investigation.

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tion, in the case of *Emperor v. Yelluaddi*, 6 Bom L R 337, the accused admitted ill usage, viz the unjustifiable violence used to the accused for his arrest, illegal detention of the accused in the police custody for more than twenty four hours after his arrest, and the marks on his person were held to have vitiated the voluntary character of his confession, which was, therefore, not admissible. *Rom L R 337*. The

object of a

R. v. Gould, 9 C & P 364; *R. v. Harris*, 1400. Cr C 338. The knowledge of the rule was distinctly laid down by Lord Eldon who said that with respect to knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession itself from being given in evidence, he should reject it as acquittal, unless the fact itself proved would have been sufficient to warrant a

East P C 607, *Harris* is 430, *Greenl Et 23* and delivered them up but this was done upon and no reason to reject

the declarations of the prisoner, contemporaneous with the act of delivery and that may amount to a confession

act of delivery, is to be rejected. And if the prisoner, thus improperly induced, and of the information given search for the property or person in question proves wholly ineffectual no promise of either will be received. The confession is excluded, because, being made under the influence of a promise, it cannot be relied upon, and the confession and information of the prisoner under the same influence, not being confirmed by the finding of the property or person, are open to the same objection. The influence which may produce a groundless confession may also produce groundless conduct. *Greenl Et § 232*

Confession four days after the offence and the fact of the accused pointing out the place of the burial of the body is admissible in evidence. In a case of dacoity and burial of the corpse, the Sessions Judge need not have tried it apart with the aid of the jury. *Naga Methu v. Emperor*, (1911) 2 M W N 197-1. Cr L J 488-12 Ind C 36

Where the evidence is *et verbatim*, whether in favour of the accused or not, a tribunal to reject all the evidence is not allowed. *Emperor*, 15 A L J 15. on build

No doubt the extra-judicial confession is of great importance but it must be a true extra-judicial additional evidence to be given in the question whether evidence, they are not of such a nature as entitles them to any weight, because it is impossible to ascertain the exact words used by the person. To base a conviction on Emperor, A. I. R 1928 Lah 558-29; of guilt to villagers may be as a confession before a Magistrate. to decide whether the persons before whom the admission is said to have been made are trustworthy witnesses. Emperor v. Batul, A I R 1928 O 393-5 O W N 698 When the accused were unable to explain away their confessions which clearly indicated the guilt, held that the confessions alone were sufficient for the conviction. Sital v. Emperor, 5 O W N 968

Confessions of prisoner in another case—how proved The confession of prisoner in one case in which he was convicted cannot be used against him in another case, unless they are deposed to on oath either by the person who took them down, or by some one else who heard them. In the case of Munger Bhoojan, 10 W. R Cr 66

Confession how construed Where people are so ignorant as the Burmans are, of the most elementary legal principles, it is extremely dangerous to accept an admission as a plea of guilty without the closest scrutiny of the meaning of the acknowledgment. *Ma Nyein v Q E*, U B R (1897-1901) Vol 1, 72

but does not necessarily establish the truth of the main feature. *Moore on Facts* § 1182

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24 Section 161 of the Criminal Procedure contains the provisions for recording confessions by Magistrates. The evidence of witnesses who are sent up by the police for the purpose of having their statements recorded under s. 161, Criminal Procedure Code, and who have been presumably in police custody until their production before the Magistrate, should not be recorded by such Magistrate, unless he has some assurance that their attendance and statements were voluntary. *Amj Emperor v. Bhulnath*, 7 C W N 345. The provision of this section is imperative. *Indar Nath v. Emperor*, 32 Cr L J 818-A. I R 1931 1st 100. It is to be presumed that the Magistrate has to ask him, if he does not, the Magistrate should ascertain clearly whether the statement can be made with a view to the case as though he had no other view. *Gaya Singh v. Emperor*, 32 Cr L J 818-A. I R 1931 1st 100. It is to be presumed that the Magistrate has to ask him, if he does not, the Magistrate should ascertain clearly whether the statement can be made with a view to the case as though he had no other view. *Gaya Singh v. Emperor*, 32 Cr L J 818-A. I R 1931 1st 100.

593-A I R 1931 All 609 A Magistrate must not put any question to accused which tends to incriminate him. *Emperor v Patey Singh*, 133 Ind

Compress, & P R 1893 Cr Great care and circumspection are necessary in recording a confession under section 164 of the Cr P Act. The confession must be necessary to record it.

¹ C. announcements *Kandhar v Emperor*, 15 Cr L J 633=25 Ind Cas 833, see also *Kesho Sing v King Emperor*, 20 O C R 173, 1908 F. 188.
Kura, 1882 A. W. N 166, *Imperator v Kura*, 1882 A. W. N 166, *Imperator v Kura*, 1882 A. W. N 166.

the end. *In re Rayappan*, 2 Weir 136. *Q. C. 191* *Part 2*

There is no provision for the admission in

evidence of a confession made to a Magistrate unless it is recorded in the manner prescribed by law, and even if such confession may, under special circumstances be proved otherwise, where the confession of the accused is shown to have been made under the inducement, such fact deprives the evidence of its value. *Nga Myat Hyan v Queen Empress*, U B R. (1897—1908) Vol I, 41. Where a Magistrate inadvertently omits to certify the voluntariness of a confession recorded by him under section 161, Cr Pro Code, the defect may be cured by the evidence of the Magistrate. *Ram Santhi v Emperor*, 9 Ind Cas 114=12 Cr L J 15. *Queen Empress v Inji Lalayan*, 22 M 15, *Empress v Jit*, S C P L R Cr 6, *Lana Singh v Emperor*, SJ Ind Cas 1026.

Section 161 of Cr Pro Code does not enable a Police officer, who has obtained a confession from a person, to send such person to the custody of a Magistrate, or to have him examined at the enquiry or trial for fixing him down to that statement in the subsequent judicial proceeding. *Q E v Jadub*, 27 C 295=1 C W N 129.

Section 164 of the Criminal Procedure Code, absolutely prohibits the employment of a Police officer to take a confession from an accused person when such a confession

is made on the Magistrate's statement. The Magistrate is not to be bound by the statement of the accused person but he is to be guided by the facts of the case. But he may ask as regards any ambiguity in the statement. *Blal v Emperor*, 128 Ind Cas 793. Under s 164 Cr Pro Code and s 24 Evidence Act, a confession made under an inducement is not a voluntary confession, and as such is inadmissible in evidence. *Queen Empress v Nga Shue*, L B R (1893—1900), 62. Where the accused pleads not guilty, a conviction cannot be based on a confession which is not recorded in the manner prescribed in ss 161 and 361 of the Cr Pro Code. *Nga San La v Emperor*, 11 Cr L J 11=11 C 7=U B R 1909, Vol I, form without showing that it appears that the confession was made strictly with the law. *Queen Empress* U B R (1897—1901) Vol I 47, *Queen Empress v Karim*, S C 102 Oudh.

Where there is no positive or formal statement at the precautions required by s 161 and the certificate required by sub s 164 of the confession, the presumption is that the precautions were duly taken. *Majhi v Emperor*, 104 Ind Cas 247=A I R 1927 Lab 682, *Ahemian v Emperor*, 11 Lab 38=83 Ind Cas 18, *Pratap Singh v Emperor*, A I R 1925 Lab 605. The Code contains no provision as to a confession being made in open Court, and where it is of that nature, a Magistrate may avoid its being used as the proper procedure is not to return until it is fully recorded. *Nilmadhub*, 109=27 Cr L J 957=A I R 1926 Pat 30 C L J 503=21 Cr L J 266,

reading a statement of the accused person. 29=23 A L

Cr L J 1279=88 Ind Cas 1055 A

- S. 24 a Magistrate under section 164 in exculpatory nature, *Gulam v Emperor*, 1 Pat 103=86 Ind Cas 811 A statement recorded by a Magistrate is admissible in evidence under section 164 Cr Pro Code, whether taken on solemn affirmation or not *Bahadur v Emperor*, 26 Cr L J 1063=88 Ind Cas 7=A I R 1925 Sind 289
- A confession recorded in answer to the only question viz (after due warning) 'do you want to say anything?' cannot be accepted as being in accordance with law in the absence of any indication as to what due warning was 129=59 Ind Cas 551=22 Cr L J 119 A in accordance with the provisions of section 164

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improbability of his guilt *Madan v Guru*, 4 Pat L T 381=73 Ind Cas 933=24 Cr L J 723

person made a statement in the prescribed form of question is prescribed and the extent to which a Magistrate should question the person making the confession must largely depend on the particular facts of each case *Thibu v Emperor*, 4 Pat L T 2=73 Ind Cas 569=24 Cr L J 649=A I R 1923 Pat 356, see also *Pul Tanti v Emperor*, 40 C 873=22 Ind Cas 169=15 Cr L J 25 It is highly desirable that a Magistrate in recording the confession should put various questions to an accused to enable him to decide whether the confession is voluntary one or not *Emperor v Dewan Kahar*, 72 Ind Cas 961=24 Cr L J 497=4 Pat L T 100

Emperor, 25 Cr L J 116=76 Ind Cas 180

Magistrate, showing that he observed all the Procedure Code, is sufficient and the confession of the persons making them, should be taken into account to ascertain how long such persons have been in police and, in recording their reasons for giving the information they are able to obtain on the subject *Empress v Madan*, A W N 1886, 59 (F B) Section 164 of the Criminal Procedure Code does not apply to any statement of the accused taken by the Magistrate holding the enquiry *Empress v Chatterji*, A W N 1884, 84.

Magistrate should question the person making the confession to be recorded is made voluntarily; and that the record made by the Magistrate should contain a full and true account of the statement made by the accused *Nga We v Emperor*, 2 L B R 317 When the Magistrate who recorded the confession took all possible precautions to satisfy himself that the confession was

Magistrate while certifying and stating that the confession was recorded on a Sunday and at the house of the Magistrate and the Magistrate himself that the accused was satisfied with the questions put and a full and true account of the evidence was recorded in the presence of the accused and that the confession was recorded in accordance with law 103=133 Ind. Cas 55; see also *Khanum v Emperor*, A I R 1931 L W 103=133 Ind. Cas 55; see also *Khanum v*

S. 2

Crown, A I R 1930 Lab 171-31 Cr L J 759 Where the confession of a prisoner is made in a language foreign to the recording Magistrate, and is interpreted to him by some person who is not an official interpreter, such confession can not be regarded as properly proved by the testimony of the Magistrate which is only hearsay evidence. The signature of the accused in the translated record of the confession is no evidence of its correctness, when there is no proof of the record having been accurately translated to the prisoner. *Queen Empress v. Lakhsmiya, Rat. Un. Cr C 575*

Section 364 of the Criminal Procedure Code—The rules laid down in section 364 of the Criminal Procedure Code are applicable to the examination of the accused under section 312. *Emp v. Nagar*, 4 Bom. L. R. 161. All that a Court has a right to do under s. 364 Criminal Procedure Code, is to ask the accused person to explain the circumstances which—
him Tufan v. King-Emperor 15 C. L. J. 32. . . .

283 In examining an accused person under improper to ask him such a question as "If so who did?" *Che lan v King Emperor* 70 C 1 person to a statement re presence and under the con *Bluka, Rut Un Cr C C* statement by a prisoner in

statements by a prisoner in *Yajj v Chentramma*, 3 Weir 137. Where the Magistrate instead of asking separate questions to the accused puts him a long composite question, the examination of the accused is irregular and not in accordance with law. *Hassu v Emperor*, 103 Ind Cas 847-23 Cr L J 767-A I R 1927 Lah 660. If the prisoner is not prejudiced in questions put to him does not make it

in any way in his defence
1-100 Ind C is 821-A I R
and they are applicable as to conduct - should be strictly observed,

presiding officer of the Court. The whole of it need not be in the Court's handwriting. *Empress v Riaz Ali*, A W N 1900, 203. The recording of confessions should be made by Magistrates with their own hands. *Criminal Code Memo No 7 of 1873*. But a confession recorded by a clerk, under s. 164 of the Code, in the presence of a Magistrate, in the form of a narrative and without the questions being recorded would not be illegal if the accused was not prejudiced. *Imperial Bank v Wilson*, 1902, 15 A. J. C. 111. If the accused makes a statement in the presence of a Magistrate, it may be inferred that the statement is true. *Imperial Bank v Wilson*, 1902, 15 A. J. C. 111. It is held that such a statement is not binding on the Court. *Imperial Bank v Wilson*, 1902, 15 A. J. C. 111. The Code of Criminal Procedure Code, *Imperial Bank v Wilson*, 1902, 15 A. J. C. 111.

Paranath, 37 C 735=8 Ind C 18 653.

error has not injured the accused is to his defence on the merits.' Section 333, Cr Pro Code, is intended to apply to all cases in which the directions of the law have not been complied with, without any distinction between omissions to comply with the law and infractions of it. Under that section, if the record of a confession is inadmissible owing to failure to comply with the law such as omission of documents, Act, not proved.

- 24 that it has not affected the merits of the defence *Queen Empress v Raju*, 23 B 221. Section 533 is to be interpreted liberally, and though a confession recorded by a Magistrate was in the first instance and by itself inadmissible as not being in the form of question and answer, not being recorded in the vernacular of the accused, and not bearing the signature or mark of the accused, it will become admissible by the taking of the evidence of the Magistrate that the accused duly made the statement recorded *Empress v Fularam*, 8 C P not to a Police officer and not improperly the Evidence Act is always admissible *uj-Emperor*, 8 O C 395=2 Cr L J 511 to certify the voluntariness of a confession recorded by him under s 161, Cr Pro Code, the defect may be cured by the evidence of the Magistrate *Ram Sanchi v. Emperor*, 9 Ind Crs. 148=12 Cr L J 15; see also *Khudiram v Emperor*, 9 C L J 35 The Sessions Judge

as a witness nor was evidence taken that the accused duly made the statement so recorded. Held, that as it could not be presumed without some evidence that the statements had to be recorded in English as they could not be recorded in the language in which they were made, there was no justification for their being recorded.

Judge was wrong in admitting such a record of the statements against the accused *Baua v King Emperor*, 10 O C 112=6 Cr L J 94; but see *Lunda v Queen Empress*, 8 C 277 Oudh.

A defence person by the confession Code, provided person "duly" either the Magistrate himself or some other person who was present when the statement was recorded. *Empress v Mussammat Hara* 8 C P L R Cr 6, J B R r = 104 he was 11, th 1 under solar

voluntarily made *Ma On Nyun v King-Emperor*, 1 U B R (1902-1903) Cr Pro Code, 18

This section has no made of a confession 211=19 Ind Crs 307=3 Magistrate shall record making it, he has recast where laid down that the he has put to the person made voluntarily. But it is advisable that the Magistrate should always receive a minor indium showing that he has, by questioning the person making it, satisfied himself that the confession is made voluntarily. *Khemau v Emperor*, 6 Lab 58=5 P L R 316=A I R 1925 Lab 315; d Crs 1029=26 P L R 513=26 C Under section 533 Cr Pro 1892,

in accordance provisions have that the confession or other statement was duly made *Queen Empress v Shairab*, 2 C W. N 702

Section 80 of the Evidence Act and confession. So far as section 80 of the Evidence Act is concerned, the Court is bound to make the presumptions specified

in that section in respect of the document purporting to be a confession of the accused *Sin Ban v Crown*, 1 L. B. R. 310 F. B. Both the memorandum and the certificate required by s. 161 should be attached to the confessions. The effect of these is to afford proof of the accuracy of the record, of the presence of the Magistrate, and of the voluntary nature of the confession. *Reg v Shwaya*, 1 B. 219; *Prater v F*, 1 B. 219; *R. Cr. 5, 18*.
 "Magistrate" 1
India R v 1
R. 9 Cr. L. J.
 169=16 Bom. L. R. 261=15 Cr. L. J. 433

essions, s) made by a prisoner, to any person at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his being in evidence as *test Ev § 524; Wills*
 promise of benefit,
 or a threat of harm, it is unworthy because it has been associated with an attraction too strong to reject
 person which causes our distrust
 two alternatives, one of which is truth or falsity — *Wigmore § 82*
 is a pseudo confession. It is not a confession at all. It is not made *animus confitendi*. It is merely a self-serving statement masquerading in the garb and under the name of a confession. Accordingly, it has not the relevancy of a true confession, a self-diserving statement, and is, in consequence, rationally to be regarded with suspicion. As *our*
 impairment of probative value due to

— *§ 400* The object of the rule relating to the admission of confessions is by the prisoner being self to be guilty of an *J in R v Court, 7*
 every case it is for the inner and under such
 such confessions were true or no"

Declaration must be voluntary Confessions it is said, must be voluntary. The reserve statements that a confession will be received in evidence, are equally familiar. The difficulty experienced in understanding precisely what, in these expressions given out of the fact other words several distinct ideas
 the most commonly and widely accepted meaning of the term "voluntary" is that which is employed when a confession is rejected as involuntary because the speaker has been over-persuaded, coerced by hope or driven by fear into making it
 statement
 it was true

matter covered by his declaration and honestly endeavoured to state it. An inculpatory confession

24. under a misleading inducement is therefore, said to be involuntary *Chamberlayne v Ev* § 1479

Meaning of the term voluntary The terms voluntary and involuntary are apparently used in respect of confession indiscriminately in three distinct entirely separable situations—(1) Where the will of the declarant has been left entirely unconstrained to his judgment in such a incriminating statement for the declarant
statement
subject, (3)
culpr statement To put a
incriminatory declaration b

misleading inducement, by a judicial compulsion to break silence or the

states of fact is found to exist, and what are the real considerations attending question of admissibility in any particular case in which they are present *Chamberlayne v Ev* § 1480 A confession may reasonably be said to be voluntary when it is made with the concurrence of the will,—where the volition is not for a voluntary one, the exact truth or however a confession rejected by a rule of procedure,—even though it is a matter of experience that this incriminating statement, though a subject to criticism or the argument of counsel would still warrant the jury as reasonable men in acting in a word none with it *Chamberlayne v Ev* § 1483

Scope of section 24 In this section the framer of the Act perhaps properly avoided the use of the word voluntarily or involuntarily which is of doubtful import but stated the circumstances under which a confession is made by saying that a confession is one of receiving some benefit on in with pending proceedings in authority over the court. Section 24 of the Evidence Act provides that a confession of an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement having reference to the charge against the accused.

of voluntariness 2 Bom L R J 228 The reason for rejection of confession thus stated by *Egerton v B* A confession forced from the mind by the

... when
given to
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counsel
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quences the
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overestimating it. The law does not presume it is untrue, but rather that it is uncertain whether a statement so made is true." Lord Campbell, C J added "I doubt whether the rule excluding confessions made in consequence of an confession is and that known from same case

Pollock C B said "There is no presumption of law one way or other. There is no presumption that it is false, or that the law considers that such a confession is true, but such confessions are rejected because it is dangerous to leave such evidence to the jury" Russell 11 Cox C 1 639 Williams J said "It is saying the truth elicited that these confessions are excluded, but the law is jealous of not having the truth" Similarly in Scott's Case, 1 D & B 58, Campbell L C J reiterated "It is a true maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary, but this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say that which is not true, and the supposed confession can not be safely acted upon" The principle upon which all this class of cases is founded is that by inducement being held out to the prisoner, he may be led to suppose that he will be more mercifully dealt with if he confesses and that

temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment

preferable. The law cannot attempt to weigh testimony before even listening to high opinion of a witness. Thus conceivably than silence unless a confession of a confession more § 822 section 24 of

the Indian Evidence Act. Section 24 contains an absolute rule which is not affected by the proviso made for a different purpose in section 27. When the Legislature wished to make an exception to the absolute rule, it did so by a separate section, namely confession rendered irrelevant that are irrelevant under other section of the Act. promise can be relevant, e.g. *King Emperor v Nga Po Mun*, 2 L R 168, *Nga Sanya v King Emperor*, U B R 1909 1st Cr Evidence 3=11 Cr L J 41 1 Ind Cas 759, but see *Amriddin, v Emperor*, 45 C 557=22 C W N 213. A confession to be

- S 24. But, in coming to a decision
law and principles which
Justice and should not be in
recording what should be
evidence adduced *Nja Shue v Queen Empress*, L B R (1883-1900) 14
A confession by an accused person is not made irrelevant if otherwise
relevant merely because the accused person has been sworn or affirmed *Raj v*
Empress, 3 P R 1880 Cr An oral confession by an accused person no
1 - - - - - 21 22 or 26 of the Evidence Act is, as an

Emperor v C 57-23 C W N 213-37 C L J 148-41 Ind Cas 305-31 Cr L J 305, but see *Emperor v Nja Hung*, 35 Ind Cas 962-17 Cr L J 402-U B R (1916) Vol II 114 *Jara Singh v Emperor*, 29 Ind Cas 317 11 P R 1915 Cr = 16 Cr L J 345

If the case against the accused entirely rests on the confession made by the accused and there is a conflict as to the manner in which the confession was obtained, the accused is justified in asking the Court to give him the benefit of doubt *Rahman v Emperor* A I R 1930 Lah 88 Where a person of sound mind and of full age makes a confessional statement in ordinary language after he has been warned he must be bound by the language of the statement and by its ordinary plain meaning and a subsequent retraction of the same is of no effect *Munari v Emperor*, 121 Ind Cas 247-A I R 1930 Oudh 353-31 Cr L J 1210 Where the confession made before the police was found by the Court not to have been voluntary it cannot be corroborated by the confession of the accused as an approver, subsequently retracted *Sufi v Emperor* A I R 1930 Nag 259-124 Ind Cas 459-31 Cr L J 661 A confession made by an accused person is not invalid merely because it was made under the benefit by making it *Public Prosecutor v I R* 1919 Mad 92 A confession is a criminal case The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by s 24 or 26 *By Andan v Emperor* 133 Ind Cas 151-A I R 1931 All 91 A confession alleged to have been made by the accused person in the jail to the warder in the absence of any evidence on the part of the prosecution to prove it

- 17 A 200-21 A I R 143-111 Cr L J 536

v Emperor, 26 Cr L J 957-86 Ind Cas 1001-A I R 1930
Where the Magistrate who recorded the confession took all possible precautions to satisfy himself that the confession was made voluntarily and that the accused and he
the conf
111 that
In C
3 Cr L J 712-8 A I R 116

The mere fact of a person being in custody cannot be a valid basis for a confession, if it is induced by an inducement, threat or promise. *S. 24, Cr. P. Code*

Lawrence Act *Dip Singh v. Emperor*, 27 Cr L J 158=101 Ind. Cas 891, A. I. R. 1926 All 246.

that a certain set of words used in a particular case has been held to be in the nature of an inducement. *Kunja Subulu v. Emperor*, A. I. R. 1929 Pat 275. Where there is a veiled threat as well as inducement, a confession so obtained is invalid. *Kunja v. Emperor*, A. I. R. 1929 Pat 275.

Made A confession made to one person by the accused is irrelevant, even where the inducement, threat or promise is held out by a different person if the confession is made to a person who is a prisoner, for a confession by the use of a promise made by a person not to be presumed to have induced him to confess the crime. *Russ Cr p 303*

C R 416 But unless the confession is made to a person who is a prisoner, for a confession by the use of a promise made by a person not to be presumed to have induced him to confess the crime. *Russ Cr p 303*

Accused person The expression "made by an accused person" in this section, means that person must be an accused person at the time of the confession. *Per Sunlara J in Kumara Swami v. A. I. R. 35 M 397 (1936)* see also *Emperor v. Jaiab* 4 C. W. N. 129. The words "accused person" in this section, means that person must be an accused person at the time of the confession. *Per Sunlara J in Kumara Swami v. A. I. R. 35 M 397 (1936)* see also *Emperor v. Jaiab* 4 C. W. N. 129.

It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession. *Per Shah J in Emperor v. Chhina* 22 Bom. L. R. 1247=19 Ind. Cas 324, A. I. R. 1931 Bom 1247.

It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession. *Per Shah J in Emperor v. Chhina* 22 Bom. L. R. 1247=19 Ind. Cas 324, A. I. R. 1931 Bom 1247.

24. was present when the deceased was killed, then stated that he and not the accused had shot the deceased, is properly excluded unless the person whose statement is offered shall be produced as a witness. *Selby v Commonwealth (Ky) 80 S W 221*. The prisoner may of course, disprove his guilt by proving the guilt of some other person. But he cannot do that by introducing the extra-judicial confession or declaration, or that he had committed the crime, never conclusive upon the declaration because of this so-called confession. To receive such statements as exculpatory proof would be to open wide the door for the practice of fraud whereby the acquittal of the real criminal would be assured. *Underhill Cr Ev § 145*

If it appears "The words lend some colour to the argument that the confession ought to be made to appear to the Judge to have been improperly induced—in other words that the *onus probandi* is in the first instance on the prisoner. I do not accede to that argument. A confession may appear to the Judge to have been the result of inducement on the face of it, and apart from any proof at all. In every case, I contend, where a prisoner says he has been forced to confess the Judge is put upon judicial enquiry, and as I ended before, I end now, that enquiry should precede the admission of the confession and any examination into its truth" *Lex, 2 Bom L R (Journal) 163*. "A confession seen made voluntarily in section 24 of the same Act. When admitted, and acted on only if it is proved to be voluntary." *Basu v State*. The use of the word 'probably' in the Act is perhaps in a particular case fairly hesitate to say that it was proved that the confession had been unlawfully obtained and yet might be in a position to say that such appeared

case, it appears to the Court that there is reason to suspect that a confession was

take into consideration conjecture. *Em Cr L J 497*—depends upon a

to undecidability

Ind Cas 1001—A I R 1925 All 606

In *Pratap v Panchikari Dutt*, 29 C W N 300—52 C 67—86 Ind Cas 111—C Cr L J 782—A I R. 1925 Cal 587, Mr Justice Mukherjee said

attached on surmise. Ind Cas 961—A I R 1925 Cal 587. The guilt of a confession on evidence antecedent to it is liable to rejection upon this issue and upon the contents of the confession. —26 Cr L J 937—A I R 1925 Cal 587.

"There are words and expressions in this section to which one must point out S.
direct his attention in order to construe the section. There occurs the word
'appears', the 'inducement
against the accused person'

is said as to the person
in inducement, threat or promise would in the opinion of the Court be sufficient to
give the accused person grounds which would appear to the accused person
(and not the Court) reasonable for supposing that by making the confessions he
would gain an advantage or avoid an evil of the nature contemplated in the
section. It will be seen therefore that the mentality of the accused has to be
judged rather than that of the person in authority. That being so, not merely
actual words, but words accompanied by acts or conduct as well on the part of
the person in authority, which may be construed by the accused person situated
as he then is, as amounting to an inducement, threat or promise, will have to be
taken into account. A perfectly innocent expression, coupled with acts and
conduct on the part of the person in authority together with the surrounding
circumstances may amount to inducement, threat or promise. In scrutinising a

at the Court will
t, to determine
ertain grounds,
l to see whether
position that is
the confession

appears to have been caused in consequence of the inducement, threat or promise
the use of these vague expressions has been deliberately made with the object

this direction. A study of the cases, bearing upon the question, which are
too numerous to mention, would show that anything ranging between the
barest suspicion on the one hand and absolute certainty on the other has
been held to be sufficient to satisfy the requirements of the section. In this
connection reference may be made to *Reg v Balwant* 11 B H C R 137,
Shafi v Emperor A I R 1930 Nag

15 B
Empress v
Pranani
tion is not

h is not as strong an expression as proved

N 1112 = A I R 1929 Cal 226 The true

view seems to have been taken in the case of *Empress v Prani* 1925

Thompson, (1893) 2 Q B p 12

matter, with regard to which there

opinion in this country is well

of the Indian Evidence Act and also to the presumption attaching to certain
recorded confessions and arising under section 80 of the Act the true and

been obtained by use of threat, persuasion etc Anything from the barest

24 suspicion to positive evidence would be sufficient for a confession being admitted
Raghu v. Emperor, 23 A. L. J. 521=89 Ind. Cas. 903=L. R. 6 All. Cr. 161-6
 Cr. L. J. 1431=A. I. R. 1925 All. 627 P. C.

Burden of proof—English law The question of voluntariness is for the

2 Q. B. 12, *R. v. Rose*, 19 Cox. 717, *Abraham v. R.* (1914) A. C. 593 (610, 611-18 C. W. N. 705 (P. C.) where all the English cases have been reviewed, *Phy*,
 18) 1 K. B. 301 But *Prof. Wigmore* interpreted
Thompson in a different way. He was a
 middle pub, and seems to receive the confession
 improper inducement, and then in case of
 doubt leaves upon the prosecution the burden of convincing the Court of the
 admissibility *R. v. Thompson* (1893) 2 Q. B. 12, 18, *Cair J.* (in case of doubt)
 See also *Chamberlayne's Ev.* § 1579

Burden of Proof American view 'Under the early English procedure
 which has been followed and still prevails in a majority of American Courts (*R. v. Thompson*, [1893] 2 Q. B. 12, *R. v. Harrington*, 2 Den. Cr. 447, *Thompson's Case*, 1 Leich. Cr. L. 3rd Ed. 328 *Emperor v. Bhagi*, 8 Bom. L. R. 691) the
 burden of evidence is upon the prosecution to satisfy the Court upon the tender
 of the confession in evidence that it was voluntarily given, to the extent at
 least, of showing that no threats, promises or other misleading inducements were
 held out to the declarant by the person to whom the confession was made.
 Where objection is taken to a confession as 'involuntary' its voluntary nature
 must be affirmatively established in the first instance by the prosecution to the
 reasonable satisfaction of the presiding Judge. This may be done either by
 direct or circumstantial evidence. Such a requirement will, however, receive a
 fair construction. The State need not show beyond a reasonable doubt that there
 was not the slightest fear or the least possible hope of benefit in the mind of the
 declarant.' *Chamberlayne's Ev.* § 1579 The view has also found representa-
 tives that the prosecution must not merely in the above circumstances, but in
 all cases show the absence of an inducement from any one else and not merely
 from the person receiving the confession (*State v. Garvey* 28 La. An. 559).
 This is an absurd extreme. A few jurists regard the confession as *prima facie*
 admissible and require the defendant to show that the alleged improper
 inducement existed. The reason to object to the
 Of course he should
 the Court's ruling,
Chamberlayne's Ev. § 1577 1578

Introduction of confession into Evidence It is a natural, if not inev-
 itable, says Mr. Chamberlayne 'result of the rules of procedure rejecting con-
 fessions deemed, for some reason, involuntary that a prisoner's counsel is
 tolerably certain to contend that his client's statement of guilt was not a
 'voluntary' one. Usually the chance for success on the main issue of the trial
 is entirely dependant upon his ability to keep that confession from the jury.
 Much
 subject
 selves
 nature
 evidence. In the absence of statutory regulation, or binding precedent, the
 presiding Judge will be called upon to consider (1) Shall he decide the question
 of admissibility upon
 prosecution or shall
 examine the government
 (2) Is it better that
 jury or after their retirement from the courtroom? (3) Would it be better
 whole, sounder admin-
 the prisoner's statement—
 alternative instruction
 they find that it was not 'voluntary' as that term is defined by the
 procedure?—*Chamberlayne's Ev.* § 1577

1112; *Emperor v. Panich Kori*, 29 C. W. N. 300-52 C 67, *Wingmore* § 861, *Borton v. State*, 167 Ala 108; *Emperor v. Kesari*, 11 Bom L R 332. The right

both parties, at the stage of *voir dire*, to enter upon an extended range of enquiry into all facts bearing upon the voluntary nature of the confession, tracing any attendant circumstances under which it was made and also the physical, mental and moral characteristics of the declarant. The Judge, on the other hand, as is elsewhere said, may receive the confession in evidence upon a *prima facie* showing by the prosecution that it is relevant;—leaving to the defendant at an appropriate later stage, an opportunity of showing that the confession was in fact involuntary. Among considerations tending to exclude the evidence of the accused at that stage is the very important one that it is not customary to consume time by hearing affirmative defences resting upon controverted fact on *voir dire*. It is not, moreover likely that a Judge will overlook the further consideration that evidence, as a rule, is admitted whenever the jury might reasonably act upon it, and that, unless the facts are such that

probable that it would be within short, conclusive point disposing the trial of receiving the evidence it once is obvious. It has been said that where, the burden of evidence is upon the defendant to show the

heterodox rules prevalent in
in admitting evidence. In

“(1) The Judge must hear the defendant's evidence (including evidence

may be introduced

R 338-A I R 1930
voluntarily made and was
it in evidence once it
not *Emperor v. Kesari*, 11 Bom L R 332-2 Ind Crs 514

The maxim of the English Courts is
no influence used, or decide upon its
But the Indian Act places

In *Reg v. Navojji Dadabhai* 9
leaves it entirely to the Court to fix

evidence which would be rejected in

5. 24. suspicion to positive evidence would be sufficient for a confession being direct
Raghu v Emperor, 23 A L J 821=89 Ind Cr 903=L R 6 All Cr 161=6
 Cr L J 1431=A I R 1925 All 627 P C

Burden of proof—English law The question of voluntariness is for the Judge; and it is now settled that it lies upon the prosecution to establish, and not upon the accused to negative the element, it being the duty of the prosecution to satisfy itself therefore before putting the statement. *R v Thompson*, (1893) 2 Q B 12; *R v Rose* 18 C W N 705 (P C); *Li 7th Ed 256*; *R v* the ruling laid down in modern English law unless attacked by evidence of an improper inducement, and then in case of doubt leaves upon the prosecution the burden of convincing the Court of the admissibility *R v Thompson*, (1893) 2 Q B 12, 18, *Case J* (in case of doubt) See also *Chamberlayne's Ev* § 1579

view 'Under the early English procedure prevails in a majority of American Courts (*R v Warringham*, 2 Den Cr 447; *Thompson*), the Case, 1 Leach Cr L 3rd Ed 28, *Emperor v Bhagi* 8 Bom L R 697), the burden of evidence is upon the person of the confession in evidence; at least, of showing that no threats, held out to the declarant by the person to whom the confession was made. Where objection is taken to a confession as 'involuntary' its voluntary nature

declarant' *Chamberlayne's Ev* § 1579 "The view has also found representation that the prosecution must not merely in the above circumstances, but in all cases, show the absence of an inducement from any one else and not merely from the person receiving the confession (*State v Garvey*, 28 La An 351). This is an absurd extreme. A few jurists regard the confession as *prima facie* admissible, and require the defendant to show that the alleged improper inducement existed. This is the reason Of course the Court *Chamberlayne's Ev* §§ 1577, 1578

Introduction of confession into Evidence "It is a natural, if not inevitable," says Mr *Chamberlayne*, "result of the rules of procedure rejecting confessions deemed, for some reason, 'involuntary', that a prisoner's counsel is tolerably certain to contend that his client's statement of guilt was not a 'voluntary' one. Usually the chance for success on the main issue of the trial is entirely dependent upon Much learning subject Nice question serves to a trial nature of the statement evidence In the absence of statutory regulation, or binding precedents presiding Judge will be called upon to consider (1) Shall he decide the question

jury or after their retirement from the counter room (3) Would it be

confession, it is obvious that the various situations can be best grouped according to the nature of the inducement. But as the strength of the inducement depends more or less upon the power of the person offering it, the rule of law must first specify the kinds of persons from whose mouths the inducements may be

Though a too restricted person in authority" in this had authority to interfere in I be sufficient to give him that authority; *Emperor v Antul* 57 C 188-A I R 1930 Cal 633. Unless the person attempting to obtain a confession has the power (apparently to the confessor) to carry out the threat or promise, there is no reason for treating the

facts which may amount to a confession, and such statement, if not privileged by reason of the relation between the accused and the party to whom it is made may be used. For example, X, who is charged with the murder of A, is induced by the chaplain of the jail to confess his sins. He accordingly confesses the crime with which he is charged. *Reg v Gilham*, 1 voluntary. *Reg v Gilham*, 1 tried at Exeter Summer Assize prisoner to confess a murder the denunciations of scriptural it could be used against him, and *Best C J* refused to allow the clergyman to

that it was improper in the clergyman to by the prisoner, and expressed a strong *les* cited *Perke*, 78, *Williams*, v *Williams*,

On principle, such a promise should be of no consequence unless the promisor was one having (apparently) the power to arrest or prosecute. *Wigmore* § 829. In England the older and more usual view was that inducement to exclude must come from a person who has legal interest or authority in the arrest and prosecution. *R v Row* R & R 153, *R v Gibbons*, 1 C & P 97, *R v Warringham*, 2 Den C C 447, *R v Taylor*, 8 C & P 734. In 1839 *Lewin* in his note to his 2 Lew Cr C 125 said "The cases seem to establish the principle that where a confession is obtained through the medium of a the prisoner can have nothing to hope *R v Dunn*, *R v Slaughter*, 4 C & P telling a prisoner that it will be better confession made to him. See also *R v Spencer*, 7 C & P 776. Finally in 1852, the earlier view was confirmed, and the existence of a legal interest in the prosecution was taken as the test—not the mere existence of actual control or influence growing out of social or commercial relations of the persons. *Wigmore* § 829. In connection with an inducement held *Moore*, 2 Den Cr C 522 said (when it was

24. England without a moment's hesitation" 2 Bom L R J 237 But it must be remembered in this connection that the English practice which is based on drastic procedural rule has provoked much unfavourable comment from judges seeking to operate a rational system of judicial administration Vide *Per Br 1 Parke in R v Moore*, 2 Den Cr C 522 (527), *Chamberlayne's Ev* §§ 1007, 1033

Was the inducement sufficient by possibility to elicit an untrue confession of guilt While no one seems to have questioned the fundamental principle of exclusion of confessions, there has been a decided difference of practice in the kind of test used in applying the principle It has been seen that the reason for distrusting a confession arises when the person is placed in such a situation that an untrue confession of guilt (more correctly, a confession of guilt irreducibly to the single form of pardon) is the inducement of freedom which will recompense the false confession more attractive at the moment than the mere possibility of freedom, coupled with temporary restraint, which attends silence Again, where a mob's threat of hanging has induced a confession, the alternative of present certain and future possible safety proves naturally more attractive than present certain death Thus in both cases—a promise and a threat—the confession is untrustworthy because it has been associated with an attraction too strong to resist In general, then, the position of the confessing person which causes distrust is that of being compelled to choose between two alternatives, one of which involves a confession of guilt irrespective of its truth or falsity Each instance presents a confession (or non-confession) of what it is, averaging the three evidences (involvement, degree, and roughly, was the inducement such that there was any fair risk of confession? *Wigmore* § 824

Person in authority
procedural rule, says in

or, in other respects, to direct the course of the trial, 14 Q B 789. Authority in this connection may be delegated expressly or by implication (*R v. Garner*, 11 C & M 947). The term 'person in authority' may therefore extend so far as to designate any one who acts in the presence of the accused, and whose position or colour of his power in the matter may be delegated expressly or by implication.

on occasions of this nature and among the persons in authority, and must have some relation to the crime charged. The inadmissibility of a confession depends on the relative strength of the inducement to confess falsely, as measured against the prospects attached to the

24. But wherever Zamindars are directly concerned in the investigation by the direction of the Police, then they clearly are persons in authority within the meaning of s 24 of the Indian Evidence Act *Crown v Long*, 10 S L R 140. A headman is a person in authority *Zeta v Emperor*, 18 Cr L J 106=37 Ind Cas 314=10 Bur L R 270. A confession made to a police peon is invalid *Emperor v Ramadhan*, 31 Ind Cas 340=17 Bom L R 898=16 Cr. L J 742. A Lambardar is a person in authority *un, 4 Lah L J* 235=A I R 1922 : ayaldars are not persons in authority.

The expression "persons in authority" is used in the actual prosecutor and the test is, 'has the person authority to interfere in the matter and any concern or interest in it is sufficient to give him authority *Smith v Emperor*, 43 Ind Cas 605=19 Cr. L J 189. The mere fact that the accused

185=A I R 1931 Lah 406

An Artificial Rule, repudiated person extending a misleading inducement and necessarily, to be a person in authority.

admissible. So intangible a distinction between actual and ostensible authority has, very reasonably failed to commend itself to certain distinguished courts who extend the function of "persons in authority" to include those who are yet the confession is voluntary. The language of the Supreme Court of

be fairly supposed by him to be coerced, or to influence the threatened

Confession made before coroner. In England, it is now the practice to admit statements or depositions of the prisoner before the coroner if properly proved. Formerly there was some doubt as to their admissibility and the cases on the subject were conflicting. *Vide 2 Russ Cr (8th ed) 265, R v Whalley, 8 C & P 240, R v Owen, 9 C & P 83, 235, 134, Hanth, Greenw Coll Stat 137, R v Santh, C & Mar 315*. In India, the confession made before the coroner is admissible by the courts.

A statement made on oath by the accused before the coroner at the time of the inquest is admissible in evidence at the time as a confession made by him where the accused was told he need not make any statement but he insisted upon doing so. Such a statement is a pure voluntary statement. Section 20 of the Coroner's Act provides that a coroner shall be deemed to be a Magistrate for the purposes of section 26 of the Evidence Act. *Emperor v Ram Nath*, 28 Bom L R 111=50 B 111=93 Ind C is 690=A I R 1926 Bom 151; *Emperor v Mithond*, 30 Bom L R 86. But it would be wrong of a coroner to examine an accused person on oath on the ground that he did not know that the person was an accused person and thereafter use that evidence in a trial for a charge based on that evidence. *Emperor v Khatu*, 28 Bom L R 79=50 B 56=A I R 1926 Bom 141.

Confession when caused by inducement, threat or promise. The terms of the promise or threat or inducement must be such as to make the confession voluntary if it is given. *Wallis* and first rule is to what constitutes inducement. The question is one for the discretion of the Judge, and its decision will vary in each particular case. *Nort* Ev 161. The inducement need not be express. *Cox* 69. It need not be made to the accused, and does come to his knowledge. *R v* *Ev* 106. "Before a confession either judicial, or extra judicial can be received as such it must first be shown that it was in every respect freely and voluntarily made by any sort of threat or ever slight the hope. And while circum-

stances are usually invoked to determine whether the confession is voluntary yet as a safe general rule, it may be said that the statement will be presumed to

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subject to a choice. As between the rack and a false confession the latter would usually be considered the less disagreeable, but it is none the less voluntarily chosen. The term 'voluntary' then, is describing the absence of the vicious element which excludes a confession is, in ultimate exactness unsound. All conscious verbal utterances are and must be voluntary, and that which may impel us to distrust one is not the circumstance that it is involuntary, but the circumstance that the choice of false confession is a natural one under the conditions. The choice of false confession is associated with a prospect (namely) that it is not human nature to resist

whether the confession has been obtained by a third person to the prisoner's mind

but this after all is merely one of several tests or rules, which have been employed as representing a general principle underlying these differently phrased tests. The foundation of all rules upon this subject rests upon an anxiety to

petent is not because any wrong is done to the accused in using them, but because he may be induced, by pressure of hope or fear, to admit facts unfavourable to

24. found only in frequent
ment held out to the
one" *R. v Thomas*, 7
1 Den Cr C 331; *R*

whether there had been a *subordinate test* of such a nature that from fear of it the prisoner was likely to have told an untruth. If so, the confessions should not be admitted. Its exclusion rests on the connection with the inducement, they stand to each other in the relation of cause and effect. If it is apparent that no such connection exists, there is no reason for the exclusion of the evidence. *Williams v State*, 63 Ark 527, *Greenl. Ev* § 219 (a). "The well recognized misleading motives under the influence of which procedure anticipates danger to judicial administration under certain circumstances, are hope and fear. The risk run by a tribunal in relying upon incriminating statements so induced by found judicial expression of great frequency as distinguished as informative consilience influenced."

hope or fear are such as to make them unsafe to receive.

It is much more common to state that a threat is made there and this has or promise 155, *Bonner*

early, historical confession with no indefinite

tion with the 1 *Leach Cr C* 293, *R v Fennel* 7 Q B D 150, *R. v Thompson*, (1893) 1 Q B 17, *State v Jones*, 54 Mo 479, *Greenl. Ev* § 219 (a).

A confession induced by a false allegation is irrelevant even if it is true. *Queen Empress v Chintaman*, Rat Un Cr C 153. When the statements made by the accused amount to saying that the other accused were really guilty, and any share they had in the offence was owing to compulsion, they are not confession which can be used against the other accused. *Queen v Kis* 7 W R.

Confession was made by the Judge did not disbelieve it by the accused under the belief this was not a confession in is not invalid. *Public Prosecutor*

The question whether or is being confession or not arises in the Police officer or the police.

For a threat as to give the accused would gain an advantage in this case, before the accused confessed to Magistrate said to him "It is no use your trying to get out of it. You were with the pair of shoes." Held that though the language used might be considered to overcome the mind of an uneducated and inexperienced boy, yet, it was not sufficient to overcome the mind of a man of the age, experience, education, and position of the accused, so as to induce him to make a confession, and that it therefore, did not invalidate the confession. *Mukherji v. Queen Empress*, 1 B R (1897-1901) Vol. I, 147.

A *panchayat* is not a Police officer, but only a person in authority within the meaning of section 24 of the Evidence Act. Therefore a confession made by an accused before a *Panchayat* is admissible in evidence, if the *Panchayat*

does not make use of any inducement to admit his guilt *Emperor v Jasha Beica*, 11 C W N 901=6 Cr L J 151 But where an inducement to confess a crime proceeds from a member of the *Panch*, the confession made in virtue of such inducement is not bad under s 24 of the Evidence Act, the member of the *Panch* not being a person in authority *Emperor v Philip Ju e Fernandez*, 4 Bom L R 785

S. 2

Even in cases where certain words used by the Police officer to the accused amounted to a threat, that fact would not render inadmissible in evidence the information given by the accused which led to the recovery of articles which are the subject matter of the offence *Emperor v Pidak*, 17 Cr L J 33=32 Ind C 221

comes out *Zeta v Emperor*, 18 Cr L J 106=37 Ind Cas 311=10 Bur L T 270

451=45 Ind Cas 284=19 Cr L J 524 When a confession was made after Police custody for several days and the investigating Police officers the confession was made under duress *Moharab Ali v Emperor*, 23 C W N 886=53 Ind Cas 929, *Emperor v Pramatha*, 30 C L J 503; *Rusna Peli v Emperor*, 54 Ind Cas 881=21 Cr L J 177

When the admission of a confession the latter telling him to speak the case against him would not be admissible in evidence to the Act in W N

18=54 Ind Cas 893, see also *Emperor v Gunna*, 59 Ind Cas 321=22 Bom L R 1247=22 Cr L J 68

and informs it becomes in admissibility

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Misleading Inducements—Hope The real question is whether there has been any threat or promise of to tell an untruth from fear of thr
v Reason, 12 Cox Cr 229 “
 be seen that his mind is entirely free from every false hope or fear that would be likely to operate upon his mind and induce him to say that which is not true That is the principle upon which all these cases are decided *R Hornbrook* 1 Cox Cr 54

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 to the resulting statement a high degree of probative force In like man
 a fear lest an innocent person should suffer for the crime and a feeling that
 therefore an obligation exists to tell the truth at all hazard is naturally call
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to the emotion instilled by duress It is the fear of the coward of the man
 colloquially speaking, =
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 worse off, in connection
 statement apparently desired Such an emotion, united to a lively imagination
 may possess many of the elements of terror and render a declaration affe and
 by it entirely worthless for evidentiary purposes Under its influence back
 at times by the counsel of injudicious friends perfectly innocent persons have
 not only confused that they were guilty of crimes which they did not commit
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general principles to withdraw the confession from the jury In like man
 the operation of fear in a given case may have been such that the will of the
 declarant has been actually forced and controlled, the act is not his
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centuries It is the subordination of reason exercised on the facts of particular
 cases to reliance upon a general rule for which certain instances furnish a reason
 A hearsay statement may mislead a jury, therefore all hearsay statements
 whether actually pro
 confessions induced
 declarations so influe

of a confession, can be regulated or measured In *Hoyle v People*, 110
 the Court observed, “The admissibility of such evidence so largely depends

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or promise The sex, age, disposition, education, experience, character, intelligence and previous training of the prisoner are elements to be considered in

it is difficult,
cases, as the
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Williams
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State, 97

May 6, 7, *Linterhall Cr Lv* § 178

Inducement at an end 'If the impression produced by the promise or threat is clearly shown to have been removed as q, by lapse of time or by intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement, a confession subsequently made will be strictly received' *Phup Lv* 255 *R v Cleaves*, 4 C & P 224, *R v Hones*, 6 C & P 404 *R v Richards*, 5 C & P 318, section 28, *infra*

Having reference to the charge against the accused The charge here means a criminal charge or a charge of an offence in a criminal proceeding The words "having reference to the charge against the accused" read with the words "in a criminal proceeding antecedent and the words 'in reference to the proceedings against him' following imply that the inducement, threat or promise must be with reference to the charge of an offence in the Criminal Courts of the country, and the language is wide enough to admit of the construction that the charge need not have been framed nor any criminal proceedings begun at the time of the confession In other words, the object of the person to obtain a confession of having committed a crime will be, the subject of a charge with the intent that the confession may be used in the subsequent criminal proceedings In this view it is difficult to understand *Queen v Hicks* 10 B L R App 1, 5 M L J Art p 26 The inducement must have reference to any charge against the accused person *R v Mohan Lal*, 4 A 46, *R v Garner*, 2 C & K 920 A promise or threat to render a confession irrelevant, obviously imply that the prisoner is worse according as he confesses or does not confess Ad 310 302 An inducement to confess is to another and different one *R v Warner* 3 Russ Cr 6th Ed 459 (n) But this rule is not applicable where the two offences are so blended together as to form in fact but one transaction *R v Hearn*, 1 C & M 109 *Id* *Lv* § 591 Where a confession has been obtained by an inducement having no connection with the charge

without the charge being stated upon a confession was made, it was 1 D & P 245=6 Cox C C 213

been obtained from the accused by an inducement relating to some collateral matter unconnected with the charge *Roscoe Cr Lv* 43

out the inducement or threat

But a rule has been laid down in different

24. precedents by which we are bound, and that is, that if the threat or inducement is held out actually or constructively by a person in authority, it cannot be rejected, however slight the threat or inducement, and the prosecutor, Magistrate, or constable, is such a person and so the matter or mistake may be. If not held out by one in authority they are clearly admissible." So also section 24, whilst offered by a person in authority, leaves it entirely an opinion as to whether the inducement, threat or the prisoner to suppose he would derive some temporal nature by confessing. *Per Sargent C J* in *Reg v Navroji*, 9 B H C R 353 (367); see also *Per Parke J* in *R v Gurney* 2 C & K 920.

Sufficient to give accused grounds . . . avoid any evil. The Courts have construed these words liberally in favour of prisoners. Considering the ignorance of the people of this country and their dread of persons in authority, the

holding out a hope of forgiveness from God would therefore be admissible evidence. In *Empress v Mohan Lal*, 4 A 46, the threat employed was excommunication from caste for life. This was an evil probably temporal. L J J 29

Misleading inducements—Hope and Fear—Necessity for determining Actual mental State. For several reasons, it may be essential to determine in any particular case, the actual effect produced upon the mind of the declarant by the inducement or threat, and what judicial weight should be given to the confession.

offered that the falsifying motive actually operated on the mind of the accused. Logically considered however, it is frequently essential to determine the actual influence exerted by the inducement or threat upon the mind of the accused. In order to do this, it is necessary to consider the actual result produced, under the circumstances disclosed, by the influence exerted. A secondary consideration, also requiring the determination of this question of actual mental state, is that it may become the province of the jury, to find the probative weight to be accorded to the confession, in view of the infirmity consideration arising out of the inducements. Should the question be submitted to the jury, it is necessary to consider the psychological effect of the inducement or threat upon the mind of the accused, in view of the actual result produced. *Layne v Fyfe* 1489

or was deterred from making such an impression may be considered by the jury, in view of the confession made, and the circumstances, to appear that the inducement and the confession are each other in the relation of cause and effect.

S. 24

Such an enquiry will divide itself roughly, into three main lines (i) A consideration of the resisting power of the declarant's mind (b) Examination of the kind and strength of pressure brought to bear upon it (c) What administrative or procedural assumptions may properly be made as to the continuance of any mental state once shown to exist. In other words, the effect of a misleading inducement upon the mind in any given case is a result of two factors —

its objective aspect. It will then remain to examine the extent, if any, to which inducement may be taken to have defrauded at the time of making his

(A) Subjective considerations In deciding in any given case, what was the actual effect of a misleading statement it is necessary to consider not only the quantity and quality of the pressure, but the resisting power of the person whose confession is offered in evidence. The logical test of admissibility in the question Have the emotions of fear or hope, either as aroused by himself or

direct or coerce it into a particular channel. While a statement if made on account of its truth, is not rendered incompetent because it is the utterance of a person labouring under some mental disability, natural or superinduced by his voluntary act, in judging whether a given statement is true the mental capacity of the declarant to resist capacity may be natural, as in feeble minded persons, or in case of insanity, or intoxication — *Chamberlain v. Le* § 1490

Children, Feeble minded etc. Whether a confession of guilt made by a child shall be deemed relevant because truthful, is a question for the decision of the Court in view of the special facts of each particular case under proper circumstances, the incriminating statement of a child legally special readily sons in quence, may well entirely control the volition of a

will be fail to notice
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is such that the presence of

Subjective considerations—Intoxication A confession is not rendered

was furnished him by one in authority for the express purpose of inducing him to talk, and by leading the conversation in certain directions, to persuade him to confess, do not suffice to exclude a declaration so secured. Such a course of conduct ranks as a mere deception like any other, and unless more appears than the mere fact of unguarded loquacity brought about by intoxication, no ground for rejecting the confession is furnished. In other words,

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sufficient to
So long as the
is talking about,
187) When the later stages
longer knows the effect of
because entirely untrustworthy

the brain is not
and the accomplice
knows what he
is doing, 7 (C & P)

(B) Objective considerations—Hope The objective strength of the inducement which operates by way of hope or fear to bring about a confession may be as varied as is the subjective strength of individual accused to resist them. Things promised may range, in intrinsic value from those less highly desirable by persons of well balanced judgment down to considerations so slight as to render the conduct in question practically unmotivated. If hope should in any case be regarded as having induced a confession it is essential that the latter should have been made at such a time that the inducement may fairly be regarded as still operative. It is further necessary if hope is to be regarded as inaction, that some benefit, not necessarily of a material nature, should have been distinctly presented to the mind of the declarant and his ability to obtain it conditioned upon his confessing. Any mere suggestion as to the general desirability of confession or of confessing of guilt is not sufficient to show the influence of hope. Should the declarant be told that a promise of benefit had been made to him for confessing his guilt and that he had acted in accordance therewith, as intimated it is not necessary that the inducement should be

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sion because it is right and the value promise
event is not in all cases one easy to draw

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need not be specified it may be
between a mere exhortation to confess
of material benefit in the case
Chamberlayne v. Dv § 1490

Inducement must be material The thing hoped for must be of a material nature. Admonition to speak out based on moral grounds, e.g., that confession is a better thing than guilty silence is not, legally speaking, an inducement. *R v Akhtesina* 4 P 646-89 Ind Crs 961. The words used in the section are of a temporal nature. The word "temporal" is opposed to "spiritual" or "religious". A confession induced by holding out a hope of forgiveness from God would therefore be inadmissible. In *Pratt v. Mohan Lal* 4 A 46, the threat employed was excommunication from caste for life. This was an evil probably temporal. 5 M L J 99. But confession induced by moral or religious exhortation will not be excluded. *R v Gilham* 1 Moo C C 186 *R v J. L. R. 1 C C 1196* *R v Lee* 1 R 1 C C R 362, *R v Will* 1 Moo C C 452, *R v Sleeman* 1 Cox C C 245. A simple request for a confession in a given matter, though made to the accused by the person aggrieved in the matter, is not sufficient to render a subsequent confession made in accordance with it inadmissible. *Bayne v. Dv* § 1496.

Influence of a religious or of a moral nature In *R v Relford* 1 Moo C C 192 a clergyman had been on the benchness of the crime charged, the denunciations of thereby. But Best J. held that the danger was after

crime of which he was not guilty, or that a man under a spiritual relation with God could hope to please God by a falsehood, or that the confidence created between him and his pastor, or the being thrown off his guard by his confidence should induce him, not to confess (that it is not naturally so if he were guilty), but to induce him to confess falsely. Such a spiritual

convictions, or 'spiritual exhortations', stem from the nature of religion, the most likely of all motives to produce truth. They are therefore of a class entirely different from those that exclude confessions. A confession is excluded because the motive which induces it is calculated to produce untruth because it is likely to lead to falsehood. If temporal hope exists, they may lead to falsehood. Spiritual hope can lead to nothing but truth" *Joy Confessions*, 11, *R v Gilham*, 1 Mood. Cr C 186, *R v. Guiney* Jobb Cr C 15, *R v. Hild*, 1 Mood Cr C 152; *R v. Stearns*, 6 Cox Cr 245. Proof that an incriminating statement was made by one accused of crime under the influence of a moral or religious inducement to make a statement, is in reality a negation of its probative force.

Exhortation to tell the truth by
Emperor v. Whilesnar, 89
1 R 1925 Pat 772. The fear
trustworthiness of a confes-

Threats made but not influencing the accused. Where threats are made to the accused but the accused made the statement deliberately, & uninfluenced by the threats this section does not apply. *Emperor v. Inandarao*, 19 B 613 = 27 Bom L. R. 1034 = 89 Ind C. 1016 = 26 Cr L J 1478.

Advice that it would be better to tell the truth. 'On principle says *Prof Wigmore* the advice by any person whatever that it would be better to tell the truth cannot possibly vitiate the confession, since by hypothesis the worst that it can evoke is the truth, and there is thus no risk of accepting a false confession. The confessor is not obliged to choose between silence and false confession but

utterance of
is nothing in it
for if it has

But that theory does not obtain in England. A confession obtained after the advice that it would be better to tell the truth is excluded in England. *R v. Enoch*, 11 C & P 539; *R v. Hearn*, C & M 109, *R v. Langley*, 2 C & K 225; *R v. Garner*, 1 Den Dr C 329, *R v. Baldry* 2 Den Cr. C 42, *R v. Waringham*, 15 Jur 318, *R v. Gellis* 11 Cox Cr C 69, *R v. Bate*, 11 Cox Cr 686, *R v. Dogherty*, 13 Cox Cr 23, *R v. Fennell* 7 Q B D 147, *R v. Enoch*, 5 Car 539, *Queen v. Uzier* 8 W R Cr 13, *R v. Thompson* (1893) 2 Q B 16, 18

'It can hardly be said
to confess what he
96 Kelly C B said
meaning that they
confessions. Some

cases have gone the length of saying that a statement is inadmissible if it is
'er tell the truth. For my part, I
that he had better tell the truth
had better confess, when you do
not know whether he is guilty or innocent' *Per Penock J in In Nobodery*
Chandra, 1 B L R Cr 15. 'Much conflict says Mr Chamberlayne exists
among the judges as to whether an exhortation to hope or suggestion that

received in evidence a statement *prima facie* induced. The ruling seems justified, for, upon the surface the inducement if any, held out to the declarant is a moral one. It is required that no threat or promise or favour by one in authority should have accompanied the suggestion. On the contrary the use of but slightly varying expressions such as 'it will be better for you to tell all you know' or 'you had better tell the truth', has been held to exclude a confession so induced. *Chamberlayne's Ex* § 1517. A mere exhortation to

5. 24. the accused to speak the truth could not be construed into an inducement, threat or promise, and, least of all, into an inducement to make a false confession and is not enough to exclude evidence of a confession
 55, 9 P R 1891 Cr
 made by a superior
 24 of the Act
 11 Cr R 37

the moral or religious

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will do what he is told

the subsequent confession

statement of the person in authority frequently both in tone and language

take the

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case if he is

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tion with the proceedings, will accrue

in the manner requested There is plainly danger in such a situation

volition of the accused be over-powered, that he will state the truth not as it is

but as he thinks will be pleasing to the officer, or other person in authority

to have him say that it is Adopting this distinction the Courts of several

jurisdictions have regarded the statement of an accused person thus influenced

is inadmissible under the rule, because involuntary Chamberlaine's Ex

§ 1516 1516

or perhaps under the violent pain of the rack, he thinks of nothing but present relief from agony which his confession will gain him Wigmore § 633
 A confession is not admissible, which has been made immediately after the
 prisoner with others had been threatened with a loaded rifle It was immaterial
 that the threat was not made to extort a confession, but to suppress an attempt
 at mutiny Queen v Hicks, 10 B L R 411 It is a mistake to suppose that
 a confession cannot be irrelevant under section 24 unless it can be alleged that
 there was torture leaving marks of personal violence Under the section the
 confession becomes irrelevant if the making of it appears to have been caused
 by any inducement, threat or promise Queen Empress v Harajan, 20 B L R 122
 3 Bom L R 122

Promise of pardon A confession by promising immunity from prosecution of another case is not admissible against the confessor Haloo v R,
 12 P W R 1907 Cr - 5 Cr L J 437, see also Abdul Karim v K F, 1 A L
 J 110-1 Cr L J 211 Mahommad Shafi v Emperor, 1 P R 1899 Cr
 v Radha Kissen 9 P R 1869 Cr R v Ishjar 2 A 260, Nya 10 v
 Emperor L B R (1872 189) 396 10 v Emperor, 45 A 633, Emperor v
 Infant 32 C L J 201-60 In l Cr 417-22 Cr L J 225, Queen v J 203,
 C 30 (73), 12 v Kora Govindan
 Baidulla v R 10 P R 1890,
 11 Cox Cr 69, O Hojan J and
 the prisoner induced by a person in authority to make the information
 ing himself by the hope of obtaining the immunity of an approver I think
 he was He became a Crown witness in a reasonable expectation that he
 would escape punishment as a return for his accepted services in bringing
 offenders to justice Where a promise of safety was made by a Police officer to
 whom the accused confessed, which confession was repeated before the committing
 Magistrate and the accused also made a confession, although different in

at the confession before the S.

It is an inducement or threat
to withhold my matter within
voluntary statement given
in evidence as against him

Reg v Alibhai, 8 B H C Cr 103

Inducements involving a higher punishment, mild treatment in prison or
a reward of money "It is scarcely conceivable" said *Prof Wigmore* "that

they do so they will receive lenient punish-
entirely wrong impression and to be
Kang Emperor, U B R (1916) 2nd Qr.

p 113=17 Cr L J 103=35 Ind Cis 962,
820, *People v Johnson*, 41 Cal 153, *Smith v*

in treatment while in confinement cannot

a false confession *R v Green*, 6 C & P 655, *Com v Dillon*, 4 Dall 116

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Cr. 337
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Lackburn, 6 Cox,
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and reject absolutely a confession so induced Where the circumstances of a
obably thus induced, let it be excluded
the basis of so unusual a contingency
Evidence" *Wigmore* § 835

Promise of cessation of prosecution release from arrest etc A promise

you will tell me where my goods are I will be fore able to go
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Simpson, 1 Moody Cr C 410 It

was disallowed as it was obtained

do all he could Similarly in *R*

because there the prosecutor said if you will not tell we of course can do

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Assurance that "what you say will be used for you" or "used against
you" The advice of one in authority promising that "what you say will be
used for you" was regarded in many cases as excluding a confession As
regards confessions thus obtained *Cotteridge J* said "I cannot conceive a more

24. direct inducement to a man to make a confession than telling him that what he says may
R v Dreu, 8 C & P 140 The
Hornbrook, 1 Cox Cr 55, where he

430 by *Lord Campbell C J*, *Pe*
 But in *R v Moore* 2 Den Cr C 5
 that "however slight the threat
Wigmore § 837

Assurance that "you had better confess" The phrase "it would be worse for him if he did not confess or better for him if he did" (*East* Pl Cr 7, 654, *R v Kingston*, 4 better for you to tell Cr C 410), "you had 6 C & P 353), "you had 7 C & P 579), "if any other person had to do in the case, it is better you should tell," (*R v Moody*, 2 Cr & D 347), "you may as well tell me" (*R v Crofton*, 2 Cox Cr 67), "because it would save him the shame of a search warrant" (*R v Collins*, 3 Cox Cr 57), "it would be best for him if he would tell how it was transacted" (*R v Warrington*, 2 Den Cr C 417, "if you do not tell, it would be worse for you" (*R v Cheverton*, 2 F & F 833, *R v Cole*, 10 Cox Cr 536) and "it will be right thing for M to make a clean breast of it" (*R v Thompson* (1893) 2 Q B 12, 18) were held to be vitiating inducement. "In a given case" says *Prof Wigmore* "the exclusion may occasionally not be improper under all the circumstances, but that such a phrase, or its equivalent, should in itself and as a rule operate to vitiate the confession is wholly bad or principle and in common sense" *Wigmore* § 838 "The mental effect of a suggestion that the accused had better confess is much the same as that of a declaration that he had better tell the truth; although, in form at least the injunction to tell the truth presents an alternative of self exculpation which the suggestion to confess does not. As however, the advice to tell the

confession
 tendered

when offered by a person who is not a party to the proceedings, it is to be disregarded. Viewed in this light an intimation to the declarant that he had better confess is treated as an assumption to be made by the injured person does not impair a confession given in compliance with the suggestion. *Chamberlayne's Ex* § 1526

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W L J art 1
 J (*Empress* v J
 sentence, that he will
 be like - 5 M L J

Retracted confession—Corroboration of To use a confession as evidence against the accused, the Court must be satisfied (1) that it is voluntary, and (2) that it is substantially true. Moreover, it is a general rule of practice not to act upon retracted confessions, unless they are corroborated on material points by credible independent evidence. *Crown v Motan*, 2 S L R Cr 31=10 Cr L J 20; *Mahammad v Crown*, 5 P L R 1915=1 P W. R 1915 Cr=16 Cr L J 157=17 Ind Cas 221; *Hanprosad v Emperor*, 36 Ind Cas 133=17 Cr L J 453; *Sher Khan v. Crown*, 2 P W. R. 1917 Cr=75 P L J 1917 Cr, *Queen Empress v Ginn*, Rat Un Cr C 817. It is a recognised rule of the Law of evidence, that a retracted confession may be used against the person making it, but not against other accused jointly with him. *Chet Singh v. Crown* 28 P W R 1907=7 Cr L J 227, *Yasin v Emperor*, 28 C. 683. A Judge should in the first instance, see whether a retracted confession is voluntary or has been improperly induced. The mere fact that prisoner puts in a plea of guilty made it by allegation

induced. That is a

If, upon weighing it appears to the

Judge that the confession has been improperly induced, no matter how true it may be, he is bound to exclude it, it then becomes evidence and liable to be appreciated and weighed with the rest of the evidence in the usual way. *Emperor v. Bhagji Vedu* 11 Bom L R 697=4 Cr L J 332, *King Emperor, v Durga* 3 Bom L R 441, *Ujaji v Emperor* A I R 1927 Lah 683=104 Ind Cas 247.

certified by a Magistrate, is not enough if unduly induced. *Queen Empress v*

by credible and independent evidence,

it is unsafe in the majority of cases to found a conviction on a retracted confession. A retracted deposition does not of itself afford a sufficient corroboration of a retracted confession. *Empress v Chutia* 13 C P L R 107 *Queen Empress v Bhaimappa*, 12 M 123=2 Weir 376, *Empress v Tila Ram*, A W N 1880, 52; *Queen Empress v Rang* 10 M 295=2 Weir 361, *Queen Empress v Ranu* 19 M 482=2 Weir 745, *Empress v Balai Ghosh* 124 Ind Cas 486=A I R 1930 Cal 141, *Safi v Emperor*, 124 Ind Cas 459=31 Cr L J 661=A I R 1930 Nag 259, *Mnan v Crown*, 30 Cr L J 340=A I R 1929 Lah 597, *Sheonarasim v Emperor*, 9 Pat 262=A I R 1929 Pat 212; *Kunya v Emperor*, 8 Pat 289=A I R 1922 Pat 27; *Ujan Singh v Emperor*, 30 Cr L J 1046

made

trial,

to deal with him as a co accused, his retracted confession would be irrelevant under s 24, notwithstanding the special provisions of cl 3 of s 339 of the Criminal Procedure Code. *Mohammad v Empress*, 1 P R 1899 Cr, *Crown v Radha Kishen*, 9 P R 1869 Cr, *Yasin v King Emperor*, 28 C 689=6 C W N 670

Where a confession was made before a Magistrate under circumstances not liable to suspicion, and, to all appearances, fulfils the requirements of the law, the fact that it is retracted in the Sessions Court does not negative the presumption of the genuineness of the confession. *Queen Empress v Banda*, A W N. 1890, 173

A confession before the Magistrate, though afterwards retracted in the Sessions Court, is evidence against the party making it. *Queen v Jema*, 8 W.

24. R. Cr 40; *Chit Sun v.* 17 W B Cr 4,
R v Gharya, 19 B
R v. Kelvie 29 A 434; *Sarkulal*, 20 A 13.
an absolute rule of law that a confession made and subsequently retracted by
a prisoner cannot be accepted as evidence of his guilt, without independent
corroboration d confession must
depend as originally given,
and the the reason given
by the prisoner for his retraction *Sayad Hussain v. Emperor*, 16 P. R 193
Cr = 153 P L R 1903; *Emperor v Bueswar Dey*, 26 C W N 1010 Patna;
Prya v Queen Empress L B R (1872-1892) 425, *Nashley v Emperor*, 134 Ind
Cas 876-A I R 1931 Oudh 412

A confession though made voluntarily by an accused person before a Magistrate, if subsequently retracted, is not sufficient by itself to justify a Sessions Court in acting upon it. *Queen Empress v. Balint*. Rat. Un Cr C 30.

h is explained away is like a retracted
A I R 1927 Lab 519 A retracted

Emperor, A I R 1930 Lah 89-30 Cr L J 1080; Naicab v Emperor, 6 O W N. 545-118 Ind Cus 757-A I R 1929 Oudh 381; Sannal Das v Emperor, 1929 M W N 791, 9 M W N 901-A I R 1929 Ind. 31 Cr L J. 26-120 Ind Cus 5, Durga v. Emperor, 132 Ind Cus

* value of confession seems to be this

the retraction, etc
withstanding its having

kind that not only confirms the general story of the crime but also, unambiguously, connects the

P. L. R 1914=15 C

R 1914 Cr; see a

Chitsun v Crown, 1
Cal. 622, 1

Cal. 633 It can
made and subject

made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to

retracting them were true. An omission on the part of the Judge to
circumstance to the Jury amounts to a
misdirection. Voir 533; Queen *Ex p.*
Bhag, Rat. 19 B. 729. 115

believes that a confession made by a prisoner although subsequently withdrawn, contains a true account of that prisoner's connection with a crime, the Judge is

S.

indicate that it is a natural narrative of what took place in the presence of the man making it, and is not at variance with any evidence in the case which is believed

mouth

224; *Queen**Empress*

W

fession

was not liable to be convicted on the confession alone. *Queen v Hardena*, 5 N W P. 217. But confession of a co accused, though subsequently retracted is admissible in evidence against his co accused. *Sardara v Emperor*, 125 Ind Crs 639=31 Cr L J 877=A I R 1930 Lah 667. Where the confession made before the police was found by the Court not to have been voluntary, it cannot be corroborated by the confession of the accused as an approver, subsequently retracted. *Safi v Emperor* 131 Ind Crs 459=31 Cr L J 661=A I R 1930 Nag 259.

In capital cases, the jury should often refrain from convicting on retracted confessions. *Queen Empress v Ruppia*, Rat Un Cr C 245=Cr Reg 12 of in a criminal case was the confession of the but subsequently retracted, and where it

the prisoners who confesse

ly retracted, such a
very good corrobora-

ground that it was
ter admission, is to be
Evidence Act, and
the proper course for

the Judge to take evidence about the circumstances before admitting the

given in the

W N 380

understood

in another

what statement was made by the accused. It is not the practice to base a conviction upon a retracted confession, unless it is corroborated. That a person,

and while not ignoring the difficulties that surround retracted confessions, it

evidence by reason of the person making it having retracted it before the committing Magistrate. *Sahib v Empress*, P L R 1900, 19 Cr. There is nothing in section 30 of the Evidence Act which would exclude, as against

5. 24. persons being jointly tried for the same offence, a confession made by one of the accused duly proved, simply because at the trial the confession is withdrawn or denied *Aung Thin v Crown*, 1 L B R 133. Certain accused persons made confessions which led to the arrest of certain other persons. The confessions were subsequently retracted, but were corroborated by the evidence of the approver. Held that the retracted confessions taken behind the back of the

rule them,
conviction
J 73=13
of J by

fracturing her skull. C made a confession before a Magistrate, which she retracted in the Court of the trying Magistrate. Except the evidence of one witness, who said he saw the two women together, there was no evidence whatever to show that C committed the crime. Held that C could not be convicted on his retracted confession. *Held also*, that production by

with

in *Mt Chandan v Crown*, 3 P W R 1304. A confession made to a Magistrate and retracted at the sessions trial, especially when that confession was not fair

Empress v Jadub, 27 C 295=4 C. where a confession was recorded under the influence of a promise, when it was corroborated in material particulars, is not sufficient to convict. *King-Emperor v Mohiuddin*, 25 M 1

made under the

164 of the Criminal

Nga Thin v Queen

if retracted afterwards

A confessing prisoner should not be condemned upon a retracted confession unless it is corroborated in material particulars. *Emperor v Mussamat Janak*, 70 P L R 1918=19 P W R Cr 1918=44 Ind Cas 179=19 Cr L J 210; *Har Prosad v Emperor*, 36 Ind Cas 133=17 Cr L J 453; *Behari v Emperor*, 60 Ind Cas 789=22 Cr L J 293.

An accused's confession subsequently retracted and not tallying with the other evidence in the case, cannot be pressed as strong evidence against him. *Emperor v Tilak*, 32 Ind Cas 331=20 L J 468=17 Cr L J 33. In the absence of corroboration in material particulars, it is not safe to convict on a retracted confession, unless from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been retracted from its genuine source, is true. *Khushi v Emperor*, 31 Ind Cas 821=16 Cr L J 815. But it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of the plaintiff without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which it was made and the circumstances under which it was retracted.

N 1010=24 Cr L J 115=A I R 1923 Cr L 217; *Bassireddi v Emperor*, 9 L J 613=18 L W 667=33 M L 1 H C 37; *Manna Lal v Emperor*, 9 O & A 1 R 947; *Moti Ram v Emperor*, 75 Ind Cas 153=21 Cr L J 401.

The duty of a Judge presiding over the trial by Jury is to prevent the production of inadmissible evidence, whether it is or is not objected to by the

They will be admitted only if they are voluntary. If the Judge is satisfied as to the truth of a confession but doubts voluntary character he is bound to exclude it under the law, though such rejection amounts to excluding truth from the Court. *Emperor v Panchkari Datta* 29 C W N 300—52 C 67—86 Ind Cas 414—26 Cr L J

It cannot be and subsequently guilt without ind of a confession is a matter to be decided by the Court in the circumstances of each particular case. *Hanna Lal v Emperor*, A I R 1925 Oudh 1. In deciding whether a retracted confession is to be admitted in evidence it is necessary to examine not only the statement of the prisoner as to how he came to make it, but all the circumstances of the case. There is no rule of law which compels a Court to raise an inference of improper inducement from the mere fact that a confession is retracted. *Partab Singh v Emperor*, 6 Lah 415—7 Lah L J 482—A I R 1925 Lah 605, *Mohor Sing v Emperor*, 96 Ind Cas 747—27 Cr L J 982. Confession though retracted, although certain detailed confession explained the con- 381 Conviction based on retracted confession which was voluntary and was sufficiently corroborated is legal. *Iqbal v Emperor* 103 Ind Cas 112—28 Cr L J 656

Procedure to be followed—Where admissibility of confession is objected to—English Practice. Now the

such alleged admission. A voluntarily. It must have been made by any promise or favour, or by any threat held out by a person in authority. *R v Thompson*, (1893) 2 Q B at p 15. So the only question in these cases really is—was any promise or favour or any menace or undue terror made use of, to induce the prisoner to confess? And if so was the prisoner induced by such promise

the evidence. *R v Thompson*

It is also important to note that the question as to the admissibility or otherwise of the alleged confession is a question for the Judge and not for the Jury.

No until objection by the prosecution. The gist of it, has been determined by the Judge.

Very often, however especially in cases of quarter sessions it is not unusual to mention was into the presence of the evidence is to be taken by the defence. And then when the evidence in chief is by statement, of the defence the Judge in the absence of the Jury.

“It must be obvious to any person that such a procedure must be very damaging to the accused because even if the objection is sustained the Jury must naturally conclude that something not in the prisoner's favour is being withheld from them.

S. 25.

"What then is the correct procedure to be adopted in such case it is

be followed in such cases. And that procedure appears to be as follows. The prosecution, in opening, should make no reference whatever to the accused's statement, and should not even mention the fact that the accused made a statement.

"In examining his witness or witnesses, the prosecution must in the same way refrain from asking the witness whether the accused made a statement. When, however, that statement is put in evidence, the defence should state this stage of the proceedings."

"In the absence of a witness or witnesses examined and re-examined, the prisoner will be entitled to call witnesses in support of his defence. This seems to be a moot point. Thus, in *Salvo's case*, an application was made by the defence to call the prisoner to give evidence in support of the allegation that the confession was made involuntarily, but such application was refused by the Judge.

"It is difficult to see, however, on what grounds the Court can refuse to hear the prisoner on the question of admissibility."

"It is submitted that the prisoner is entitled to call other persons to prove that the confession was made involuntarily, persons, for example, who would say that they were present when the alleged confession was made, but that it was made in response to an inducement or the like at the time to the

If the Judge has ruled out all to the statement must be

made. If, on the other hand, he has held that the prosecution will continue their examination, such evidence stopped in order to allow the question of the evidence to be argued in the absence of the statement will, of course, be given. It will then be necessary to examine the witness again, but before the judgment was made involuntarily, the Judge must satisfy the Jury the reason why their retirement was requested, and also his reason for deciding to admit the evidence.

"The defence in opening will, *inter alia*, deal with the question of the statement."

See also in 33 Cr L J pp 12 (Journal)

When the accused is asked the truth or form in which the statement was made, the

Emperor, 88 Ind C 18 283-26 Cr L J 1115

Confession to police officer not to be proved as against a person accused of any offence. 25 No confession made to a police officer shall be proved as against a person accused of any offence.

Difference between English and Indian Law. "Sections 25, 26 and 27 differ widely from the law of England and were inserted in the Act of 1872 (15 Geo 4) in

"In the Upper Burma insert 'who is a Magistrate,' see s 4(3) (c) of the Burma Laws Act, 1893 (13 of 1893)."

which they have been

police for the purpose

England confessions

of threat or promise *R v Kerr* 8 C & P 176, *R v Berriman* (1854) cited

in *Roscoe Cr Ev* 19, *R v Best*, (1909) 1 K B 692, *R v Man* 17 Cox C C

639, *R v Hershan*, 18 1 L R 357, *R v Dougal*, 67 J P 325, *R v Leibling*,

2 Cr A R 315, *Rogers v Hawkins* 19 Cox 123, *Ibrahim v R* (1914) A C

599=18 C W N 705 P C, 1 206, *R v*

Hirst, 18 Cox C C 374, *R v* *Harris*, 24

Cox C C 66, *Darling J* said be done to

induce or threaten, but short of that, if the person is not in custody, it is

certainly not the law that the constable may not make enquiries which may

lead to his getting evidence from a person which he may use against the

person." But a constable has no right to elicit admissions from those he

suspects *R v Mathews*, 11 Cr A R 23, see also *R v Vaisin*, (1918) cited

in *Roscoe Cr Ev* 51.

Reason of the Rule This law is applicable only in India. The following

extract from the First Report of the Indian Law Commissioners shows the

reasons which prompted the Legislature in enacting ss 25 and 26. The Police

in the province of Bengal are armed with very extensive powers. They are

prohibited from enquiring into cases of a petty nature but complaints in cases

of the more serious offences are usually laid before the police *darooga* who are

authorized to examine the complainant, to issue process of arrest, to summon

witnesses to examine the accused and forward the case to the Magistrate or to

submit a report of his proceedings according as the evidence may in his

opinion be sufficient for a conviction. The evidence taken by the

police in the province of Bengal is abundant and shows

cases of extortion and

exercised by the

the conclusion that

the facilities which

are afforded to the police in the province of Bengal are such as to

enable them to obtain evidence from persons who are not in custody

and to submit a report of his proceedings according as the evidence may in his

opinion be sufficient for a conviction. The evidence taken by the

police in the province of Bengal is abundant and shows

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and to submit a report of his proceedings according as the evidence may in his

opinion be sufficient for a conviction. The evidence taken by the

police in the province of Bengal is abundant and shows

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and to submit a report of his proceedings according as the evidence may in his

opinion be sufficient for a conviction. The evidence taken by the

police in the province of Bengal is abundant and shows

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the conclusion that

the facilities which

are afforded to the police in the province of Bengal are such as to

enable them to obtain evidence from persons who are not in custody

and to submit a report of his proceedings according as the evidence may in his

opinion be sufficient for a conviction. The evidence taken by the

operation of such

Regulation XX

y confession in

as for preventing

character of the confession confessions are frequently extorted or fabricated. A

by getting up a case against parties whose circumstances and character are such as are likely to obtain credit for an accusation of the kind against them. This is not unfrequently done by extorting or fabricating false confessions and when this step is once taken there is of course impunity for the real offenders

25. result of which is to constitute a written document. This of course will prevent a police officer from receiving any information which any one may voluntarily offer to him, but the police may statement made by a party accused.

As regards sections 25, 26 and 27

v. Babu Lal, 6 A. 509 at pp. 511-522. I have stated the effect of the observations which I am about to make that the rules contained in ss. 25, 26 and 27 of the Evidence Act were not originally treated in British India as strictly speaking rules of evidence, but rather as rules governing the action of police officers, and as matters of criminal procedure. I may take it that no such rules existed either in the Muhammadan Law or in the English rule of evidence the only two systems to which the Courts resorted for guidance on questions of evidence in criminal matters. Then after making mention of previous legislation on the subject he added it p. 523. These legislative provisions leave no doubt in my mind that the

Section 25

prisoners accused of offences

Solan v. Emperor 13 Ind. C.

in *Queen v. Hurulole* 1 C. 207,

4 A. 108 (204). The reason a

confession made by an accused

it be made in the immediate

apprehension that a police off

per one may unwillingly excite terror in their minds and extort false and

involuntary confessions and his duty to investigate criminal cases and to detect

offenders and bring them to justice may make him feel tempted to obtain

confessions from accused persons by threat promise or other improper influence

Queen Empress v. Brij 2 C. W. N. 71

Origin of the section As far back as the year 1817, the Legislature repealing the older rules upon the subject passed Regulation XX of that year which inter alia had for its object the repeal of the

can be
as in the rule

the said section provided that "no compulsion shall be used either towards parties or witnesses for the purpose of obtaining any

25. over
Queer.
R 11

made, in the first instance, to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police Mr Lambert, in the Police Office in Calcutta, when he again affirmed the truth of his former statement to Mr Lambert, and Mr. Lambert, in his capacity of a

confession made by a prisoner in custody, to any person other than a Police Officer, shall be admissible, unless made in the presence of a Magistrate. It is of opinion that is the true meaning of the 25th section. Its humane object is

any undue
to which
for reading
R, 11 C
193, in it
cer by no
a fortiori

it is inadmissible against an accused. *Emperor v Hari Singh*, 12 Bom L R 899=8 Ind Cr 622=11 Cr L J 690; *Nga Phakin v Emperor*, 36 Ind Cas 480=17 Cr L J 512. This section is absolute. *Kodumy v Emperor*, A I R 1932 Mad 24. A confession contained in a statement made by an accused person to a stranger in the presence of a Police Officer while he was in the custody of a jailor does not fall within the purview of s 25 or s 26 of the Evidence Act and is admissible in evidence. *Nadu v Crown*, 3 P R 1314 Cr=214 P L R 1914=15 Cr L J 480=21 Ind Cas 463. A confession made by an accused to a private person in the presence of the Police is inadmissible in evidence against him. *Chanau v Emperor*, 20 Ind Cas 468=37 P W R 1913 Cr=320 P L R 1913=14 Cr L J 596. Section 25 of the Evidence Act lays down that a confession to a Police officer shall not be not say that such a confession may be used subsequent judicial confession. Ind Cas 693=6 L L J 54. "a person" in this section means only in the proof of a confession as to the matter so it should be

confession as a whole is excluded, whether by reason of the section or much of the information given by the prisoner he was an accused and in custody, as discovered becomes admissible. *Amurath v Emperor*, 41 Ind Cas 321=23 C W N 213=27 C L J 113=19 Cr L J 201. See also in the *Matter of Hiran Moya*, 1 C L R 21; *Emperor v Hari*, 21 Bom L R 721. A confession made to a Police officer is inadmissible even if the

was convicted on the evidence of the
offered them Rs 10 per bull of
large quantity of illicit opium from
had been also enrolled as Police

A confession, therefore, made to
accused of any offence is inad-

only to
section 25
the use,
to Police
statement
L T, 1=
examined
this section

Empress v Jadabdas 4 C W N 129 In that case the Court

Confession—Definition of A confession is an admission made at any
e, stating or suggesting the inference,
statements which amount to a direct
y statements which
et suggest an in
The factor deter
not the motive of
e of guilt *M Din*
11 Cr L J 153.
1 338 Confession

which it is proposed to prove against him to establish an offence *Queen*

Police officer, meaning of "In construing the 25th section of the Evidence
Act of 1872, I consider that the term 'police officer' should be read not in any
strict technical sense, but according to its more comprehensive and popular,
meaning" *Per Garth C J in Queen v Hurribole*, 1 C 207 (215) A Deputy

25. Commissioner of Police in Calcutta = a Police officer. *Ibid* Primarily the term "Police officer" in this section means the same as it does in the Police Act but it can be extended beyond the definition in section 1 of the Police Act to cover only those persons who like Police officers coming within that definition, are any member of the community for doing so. That

Police officer whoever that officer may be British territory or = Police officer in foreign territory, *v. Naqia*, 23 B 235, *Mabli v Emperor*, 87 Ind Cas. 520=26 Bom L R 766=26 C L J 984; see *Salam v Emperor*, 43 Ind Cas. 111; *Nadir v Crown* 15 Ind Cas 800. A village headman in Burma who is authorized to arrest without warrant is not a Police officer so as to make a confession made to him in admissible. *Nga Myain v Emperor*, 3 Bur L J 11=81 Ind Cas 540=20 Cr L J 924. The widest and most comprehensive extension of the term "Police officer" cannot make it include a Kotwar in the Central Province. *Sulhiana v Emperor*, 25 Cr L J 117=76 Ind Cas 291=A I R 1924 Nag 29, see also *Bhagatdin v Emperor*, 59 Ind Cas 88=21 Cr L J 568. A member of a frontier constabulary is, for the purposes of sections 25 and 26 of the Evidence Act, a Police officer, and admission made to him, and not in the presence of a Magistrate by an accused person cannot be proved against the maker. *Ahaya Hassan v Emperor*, 71 Ind Cas 360=24 Cr L J 136. In the Punjab a village Chaukidar is not a Police officer within the meaning of section 25 of the Evidence Act. *Ahuda Baksh v Emperor*, 43 Ind Cas 84=19 Cr L J 52=42 P. R. 1917 Cr. See also *Dal v Emperor*, 17 Cr L J 62=26 Ind Cas 654. A *chaukidar*, although he is not a Police officer under Act V of 1861, is one under Reg XX of 1817 and Act I of 1872, and a confession made to him is inadmissible. *Empress v Indra Chundra*, 2 C W N 637, *Nazi v R*, 9 C W N 47.

Police
to him
Sin v

21), a police Sub Inspector (*Addu Sal*
19 W R Cr 51), a darogah (*R v*
police (*R v Luchoo*, 5 N W P 86).
10 B. L. R.
v Babu Lal, 6
confession made

There is no

High Courts

excise upon having the power to detain, search, seize and arrest any person whom he believes to be guilty of any offence under the Opium Act or Bombay Abkari Act has powers which are very similar to those exercised by a Police officer.

other
in
the provisions of
L R 19, 1920
1196=51 B 75=23
L R 674=97

But the Calcutta
is admissible in
section 25 of the
"Sia v Emperor",
J 579=1 A I R
C W N 824=45
151, *Aura Narain*

v Emperor, 52 C L J. 177; *Moh Lal v Emperor*, 36 C W N 163; *contra Ibrahim v Emperor*, 35 C W N 601; 9 Mys L J 71 following 51 B 18; *Maunisan Myin v Emperor*, 7 R 771=121 Ind Cis 715=31 Cr L J 303=A. I R 1930 Rang 19. An exercise officer is not a Police officer within the meaning of section 25 of the Evidence Act. *Emperor v Budhu*, 99 Ind Cis 594=A. I R 1927 Sind 112; *Pillibai v Emperor*, 83 Ind Cis 151=25 Cr L J 1223; *Mechi v Emperor*, 88 Ind Cis 32=26 Cr L J 1088=A. I R 1925 Nag 310; *Emperor v Wajir Singh*, 11 Ind C 588=3 P R 1918 Cr =19 Cr L J 361; *Muhammad v Emperor*, 39 Ind Cis 977=21 C W N 694=18 Cr L J 3 Cr L J 165=15 Ind Cis 305=5 Bur L.

ot a Police officer and confession made to him under s 25 of the Evidence Act. *Queen Empress v Sama Papi*, 7 M 357=2 Weir 235. A confession made to Yuadungyi should not be admitted in evidence. He is the head of the rural police and has police duties to perform. He is, to all intents and purposes, a Police officer though he may not be so designated. *Maung Wan v Queen Empress*, L B R. (1833—1900) 22

Confession made to a police officer whether admissible. A confession made to a Police officer is not to be used in evidence. *E v Thalam* A W N 1883, 188, *E v Pancham*, A W N 1883, 21 1 A 198. Confessions recorded

A Cr 153=106 Ind Cis 113=26 A L J 92. A confession made to another person in the presence of a Police officer, who has asked or instructed that other person to take the confession in such a way as to be his agent, where the confession takes place under such circumstances that the Police officer is in such proximity as to make his presence likely to affect the mind of the confessing person is in substance a confession to a Police officer. *Emperor v Mt Har Piar*, 97 Ind Cis 44=44 A L J 958=A. I R 1926 All 737, see also *Channan v Crown* 21 Ind Cis 168. Rule 195 of the Madras Councils Rules of Practice is not a rule of law but merely a rule for the guidance of village Magistrates and the police investigating the Magistrate know. *Emperor*, A. I R 1927

Mad 974

Where a house was searched and the recovery list, held that the fact of the recovery list is not admissible in evidence.

8 Loh 326=28 P L R 119=100 Ind Cis 707=28 Cr L J 323. If after

out the route taken by them in going to commit the offence of dacoity and the

25. 178-23 Cr L J 197 A first information of murder was lodged at the Police station by the accused himself on the morning following the murder and after stating the narrative of events prior to the night of occurrence he confessed that he had committed the offence.
- Sections of section 25 of the Evidence Act in its entirety, yet, in so far as it speaks it was admissible in evidence if and
- 62 Ind Crs 578-25 C W N 788- Police by an accused person is admissible to prove the ownership of property in respect of which he is accused *Ganpat v Banu*, 53 Ind Crs 62-21 Cr L J 414. Statement made by the accused in the presence of a Police officer is admissible.
- R 724

Confession

v Emperor, 48 Ind Cas 883-36 P R 1918 Cr = 10 Cr L J 80. A statement made by a complainant in his first report at the Police station is not admissible as proof of the facts therein mentioned and cannot be used as evidence against the accused in his trial *Dal v Emperor*, 16 Cr L J 62-26 Ind Cas 104. Accused went to a Police station and made the report "I have killed my wife and her corpse is lying in my house," in consequence of which the Police proceeded to his house, discovered the corpse of his wife in an inner room of the house. *Held*, that the provisions of ss 25 and 26 of the Evidence Act apply to the circumstances of the case *Surendra Nath v Emperor* 16 A L J 478-47 Ind Crs. In an investigation made by a Police officer himself or by somebody else in his presence statements made by accused persons while in Police custody, in answer to questions put by a Police officer, are not excluded from evidence under section 25 of the Evidence Act. *L J 106-37 Ind Crs*. The time of making an admission or withdrawal of the plea can be allowed if the accused wishes to withdraw it *Emperor v Shuldian*, 28 Ind Cas 145-44 P W R 1914 Cr.

The only evidence against the first accused was that in consequence of information given by him property was produced theft before the police conviction of the first accused not lead directly to the recovery of the property *In re Ippani Ram* 3 M L T 333-7 Cr L J 798. Where a confession was made before an investigating officer

under s 25 of the Evidence Act *Lee Bein v Queen Empress*, L B 1892) 479. Confession made by an accomplice, committed to a Police officer, was in a plea was a confession of evidence of

to a Police officer and *Queen Empress v J* made by an accomplice, tender of a pardon by an Assistant Commissioner acting in his

337, Cr Pro Code was held to be *Empress*, 10 P R 1895 Cr Section 25 confession made to a Police officer shall not be proved as against an accused person. It does preclude an accused person from proving, on his own behalf, a confession made to a Police officer by another accused person tried jointly with him. *Ibrahim v Emperor*, 12 Cr L J 79=9 Ind Cas 419. Confession to a Police officer of having given false information cannot be admitted and charged under s 182 and s 211 of *Nga Thet*, U II R (1897 1901) Vol I, 156 or rioting. During, and, admits the

information was not a confession under s 25 of the Evidence Act, and as against the person other than the informant, it amounted to an admission of evidence against them. *Hair v King Emperor*, 11 C L J 301=5 Ind Cas 305=14 C W N 593.

Where a Police officer read over to the accused the statement which he (Police officer) had taken from others and then told him 'I know the whole thing now,' and the accused, thereupon, made a statement in consequence of which he was arrested and his confession was duly recorded, held that the confession was voluntary and was perfectly admissible. *Hanmat* 3 Bom L R 401. Accused person is not illegal for a confession which is open to grave suspicion of having been produced by ill treatment of the police. *Khair Din v Crown*, 21 P W R 1907 Cr =6 Cr L J 266.

ting statement made to a Police officer by an accused person in custody. *Queen Empress, v Mathews*, 10 C 1022.

admits

The evidence for the prosecution consisted of certain confessions made to the Police. The Police found some stolen cloth for the Police. The confession was inadmissible under s 25. The confession mentioned did not justify his conviction under the section. *Empress v Nanhe Beg*, A W N 1883, 126.

Admissions not amounting to confessions. Whether admissible when made to a Police officer. Every statement is not a confession. *Ilho v Emperor*, 19 E L R 6=A I R 1925 Sind 257. An incriminating statement to a police officer, though on the face of itself exculpatory, is inadmissible. *Emperor v Inantra*, 5 Cr R 15=49 B 612 89 Ind Cas 1016. The question whether a particular statement whether it be positive or negative, verbal or expressed by conduct, is or is not a confession, must be decided on the facts of each case. *Umer Durang v Emperor* 86 Ind Cas 410=26 Cr L J 778=A I R 1925 Sind 237. After a fight in which death was caused, several accused drove certain cattle belonging to the deceased to the pound. Two of them made a statement to a Sub Inspector of Police that they were in the

5. 26 fight and that the deceased had attempted to interfere with the seizure of the cattle. Held that the statement did not amount to a confession inasmuch as it was only an explanatory statement of the circumstances under which the cattle had been seized and was not an admission of guilt but rather of the nature of a complaint against the deceased and was not therefore admissible in evidence. *Jotal v. Emperor* 81 Ind. C. 317—20 Cr. L. J. 811. A. I. R. 1923 Lah. 232. A statement by one accused to the police that certain property which he produced had been stolen to him by two other accused who were charged with him was being an admission. *Ac. v. Emperor v. Sher*. A statement made by a confession may nevertheless be used against him and more particularly if the statement to it amounts to an admission under section 23 Cr. L. J. 232 confined to from which

In Gang v. Emperor 41 Ind. C. 100. The Act does not say that it includes only confession.

to them, there being statements which are statements which is charged. Furtive leading to discovery whether such statements amount to confession. *Emperor v. Kanool Mah* 6 Ind. C. 161—15 Cr. L. J. 713—41 C. 601, *Emperor v. Buddha* 3 N. I. R. person to a Police admissible in evidence 14 Cr. L. J. 202. A statement directly or indirectly to an admission of any incriminating circumstance in evidence, hence where the accused was found carrying a box at night and when asked by a policeman on duty about the ownership of the box stated that it belonged to him the statement was held admissible against him. *Confession* by a person in the commission of an offence. For such a purpose confession for other purposes would be admissible under section 21, in his character of one settling up an interest in property in litigation, or judicial enquiry and disposal. *Queen v. Empress* 4 Cr. L. J. 131.

26 No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against that person.

* *Explanation*—In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or in Burma or elsewhere unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.

*This *Explanation* was added to s. 26 by the Indian Evidence Act (Amendment Act (III) of 1891) s. 3.

† See now the Code of Criminal Procedure, 1898 (Act 5 of 1898).

used on section 149 of the Criminal S.

III of 1891, s 3 The rules cor
in British India
governing the
Queen v. Dabu

or in rules
Procedure.
35 M 397

persons through any undue
Per Gault C J in Queen
the rule seems to be that the
of coercion for extorting conf

3 section deals with confessions made in the
the custody of an accused person that is,

presence of a Magistrate, in which case the confessing person has an opportunity
of making a statement uncontrolled by any fear of the police *Per Ainslie J in*
In the matter of Hiran Miya, 1 C L R. 21 Section 26 is not to be read
as qualifying the plain meaning of s 25 *Queen v. Harribole*, 1 C 207,
Queen v. Duman, 12 W R Cr 82 Section 26, cannot be treated as an
exception or proviso to s 25, there being no words to justify such an in-
terpretation The criterion adopted in s 26 for excluding confession is the
answer to
If the ans
police officer
evidence, unless it
be excluded from

v. Dabu Lal, 6 L
an accused person
v. Mathew, 10 C 1
makes no distinct
substantive rule

L J 290 This section does not make admission dependent upon knowledge of

M L T 1=13 Cr L J 352=35 M 397=14 Ind C's 896 But it may be
admissible in favour of an accused *R v. Pitamber* 2 B 611 The general
rule, applicable to confessions made by prisoners whilst in the custody of a
police officer is contained in section 26 and the proviso contained in section 27
Chomer Sahib 12 M 173

T to a Police Superintendent on the day next
M was arrested but neither of the other two accused was suspected of having

Confessions made in police
made to a Police officer, but not in
Queen-Empress v Ah Baksh, S
20 M L J 352=15 Cr L J

which was made by the accused when not in Police custody is admissible in
evidence *Harbans v King-Emperor*, 8 Q C 365=2 Cr L J 811, see also *Raj*
Kumar v
by an acc
his house,
back to pc

* Cr L J 524=92 Ind
he was sent by the
which involved an
examination of the patient in private Two police men took the accused from
the lock up to the dispensary At the dispensary the police men waited outside
on the verandah while the accused was inside undergoing examination at the
hands of the doctor, and during the few minutes that he was with the latter he
made a confession Held, that the confession was inadmissible in evidence under
section 20 of the Evidence Act, in as much as the accused remained in the

would be found in a heap of rubbish close to his house and after making the
statement he took out the property from the heap in the presence of two police

27. constables *held* that
admissible in evidence,
in the heap of rubbish
845=21 M L J 352=15 Cr. L J 533

Where an accused person promised, while in police custody to restore the stolen property, *held*, that the promise was an incriminating statement suggesting the inference that the 'therefore' a confession
v King-Emperor, 20 P . . .

A statement made
'if it is an admission of . . .
Queen Empress v Jaracharam, 19 B 363; *Queen Empress v Nana*, 11 B 260 & 11

Confession made in the presence of a Magistrate A confession to a Magistrate while in Police custody is not inadmissible *Nazir Singh v Emperor* 9 Ind Cas. 806=27 Cr L J 131=A I R 1925 Lab. 557, *Queen v Mani Mohan* 24 W R Cr 33, *Queen v Shahabat*, 13 W R Cr 42; *Queen v Nilma Thab*, 10 C 595 A confession made by an accused person before the Administrator in Portuguese territory, who is not a Magistrate or of the Indian Evidence Act It is immaterial that the confession was made was not himself the case *Emperor v Mhalil Rana*, 26 Bom L R 706=1924 Bom 480

Police officer, meaning of The word Police officer in this section is 'police-officer' in Native State C 855=Cr Reg 22 of 1896, 22 B 235, *Q L v Sunder Si* 257 It is doubtful whether *Nazir v Emperor*, 9 C W N 174=2 Cr L J 255 The words "police officer" in this section are used in the same sense in which they occur in section 23, and

L J 931 A Deputy Commissioner *Queen v Horibole*, 1 C 215 A is not a police-officer *Queen Anand Rao*, 49 B 493=89 Ind C *Badan Singh v King Emperor*, 2 P R 1909=7 P. W. R 1909; *Lal Rao Anand Rao*, 49 B 642 A police officer in a French Territory is a police officer *R v Viraraghava*, 11 M L T 407 A police Patel is a police officer *R v Rama Birajpa*, 3 B 12

Magistrate The word 'Magistrate' Native States *Queen Empress v Kala*, 22 B 235, *Queen Empress v Ind Cas* 257, *R v Bhuma*, 17 B in the district in which he has been

Crown 8 P. W. R 1314
, see also *R v. Pahal* 11 J 11 7
n of the French Government is a
late presence are admissible in
ted to the Magistrate exercise
Panch Nath Pillai v Emperor
Administrator is not a Magistrate

Emperor v Mhalil, 87 Ind Cas 20=26 Bom L R 706

Explanation Previous to the enactment of this explanation by Act III of 1891, it was held that a village Munsiff falls within the purview of this section and as such he was a magistrate *Empress v Ramanagitt*, 2 M 5, see also *R v Ranga* 10 M 2954

27. Provided that, when any fact is deposed to as discovered

How much of information in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such

information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved

Principle
any circumstance
to be influenced by

been induced to say
each of the confession is
35 notes (1) to R v
197 This section was
intended not to let in confession generally, but only such particular part of it as
set the person to whom it was made in motion, and led to his ascertaining the
Per Straight C J in Queen Empress v
Certain statements, made under certain
cases, considered them unworthy of credit, but the trust is removed by the
finding upon search, of articles connected with the crime or other facts 5 *Mad*
L Jour Article at p 80 "The prisoner's statement as to his knowledge of the

the admission of the exception to the general rule The fact discovered shows
that so much of the confession is immediately related to it is true' *Queen*
Empress v Babu Lal 6 A 509 (513, 517)

supports other testimonial exclusions) and the tests worked out are often more or
less artificial, but the principle underlies the whole body of rules If now a
circumstance appears which indicates that the law's fear of untrustworthiness is
unfounded and counteracts the significance of the improper inducement by
demonstrating that after all it exercised no sinister influence, the confession
should be accepted This is the theory of confirmation by subsequent facts,
about excluding
cases on otherwise
firm it in material
points, the possible influence which through caution had been attributed to the
improper inducement is seen to have been nil, and the confession may be
accepted without hesitation' *Wignore* § 856

"But it should seem, that so much of the confession is related strictly to the

L C J. states the reason for such admission thus "Because it leads to the

Origin of the rule The section 150 of Act XXV of 1861 (The Criminal
Procedure Code) runs as follows. "When any fact is deposed to by a police

27. officer is discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not as relates distinctly to the fact discovered by it, may be received in evidence" That section was thus altered by Act VIII of 1869 "Provided that when any fact is disposed to in evidence is discovered in consequence of information received from a person accused of any offence or in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered may be received in evidence" Section 150 of Act XXV of 1861 was re-embodied in section 27 of the Indian Evidence Act *Queen Empress v Babu Lal*, 6 A 509

Scope of the section In *Mahmood J* held that s 27 came down in s 25, but only that C Cr 13, 9 W R Cr 16, 11 C 6 A 509 (F B) the question

Empress v Kuarpal, A W N J said, at pp 520 521 "The question raised by this reference is one of interpretation of the Statute, and it may be briefly stated to be, whether the proviso contained in section 27 of the Evidence Act governs only the preceding section, or also s 25. In order to arrive at a satisfactory conclusion upon this point, it seems to me advisable to trace the history of the rules contained in ss 25 26 and 27 of the Evidence Act, so as to ascertain for these provisions find a place in the Code of Evidence for India. I have stated these facts as introductory of the observations which I am about to make that the rules contained in ss 25, 26 and 27 of the Evidence Act were not originally treated in British India as, strictly speaking rules of evidence but rather as governing the action of police officers and as matters of criminal procedure. Then stating that s 150 of Act XXV of 1861 was repealed and re-enacted by Act VIII of 1869 he went on "What was the effect of change of language introduced by the new section? Why was it introduced? What was its effect? The other questions which must be considered

rendering the language of s 150, a mere immediately preceding section 149 which is expressly limited to confessions made by a person 'whilst he is in the custody of a police officer' they (sections 25, 26 and 27) are identical in the rules which they lay down, though the language has been improved by some verbal alterations which require no special mention except the omission of the word 'or' from the clause 'a person accused of any offence or in the custody of a police officer' in the place of the omitted word 'or' a comma has been substituted. officer' a parenthetical clause for confession would fall under the same remarkable and, if it has any effect, proviso" But the majority of not only to section 26, but also to information given by the accused confession or not as related distinctly to the fact thereby discovered must be proved *Queen Empress v Babu Lal* 6 A 509 (F B), see also *Queen v Lajpat* 19 W R 51, *Reg. v Jora Hiji*, 11 B H C R 213, *Empress v Ramia Lajpat* 3 B 12, *Empress v Pancharan*, 4 A 193 *Thur v Queen*, 11 C 635 *Queen v Kamalia* 10 B 595, *Queen v Anna*, 14 B 260, *Surentra v Emperor*, 16 A 178, *Imaruddin v K E* 24, 22 C W N 213, *Supriental v Bhajoo* C W N 106. That the view taken by *Mahmood J* in *Queen Empress v Babu Lal*, *supra* is the correct view was reiterated by Lord Williams J in *Supriental v Bhajoo Singh*, *supra* at p 111. It has also been pointed out by *Lord Williams*

C. J. in a very recent case, that an anomalous position has been created by follow- S. 2

express mention of it is made therein, see also *Empress v Pancham*, 4 A 198
 "The reasons given for and against the view that section 27 controls section 25
 also apply with equal force to the question whether that section like wise controls
 lous that in

t receives a
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 ient may be
 g *Emperor*,
 ng *Emperor*
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 peration of
 tody of the
 custody of
 confession

or not, as relates distinctly to the fact thereby discovered may be proved *Per*
Oldfield J in Queen Empress v Babu Lal, 6 A 509 (I B) at p 513, 514 This
 police officer or by other
 in these two sections
 of it in accordance with
 nly to the extent of
 strictly relates to the fact

Per Straight C J in
Queen Empress v Babu Lal 6 A 509 (I B) at p 544 But *Mahmood J* said in
 the same case at p 541 "I hold that the rule laid down by the Legislature
 in s 24 (read with s 28) of the Evidence Act, is a rule absolutely independent
 of the question of discovery or on discovery to which s. 27 relates, that the
 state of things in India has induced the Legislature to frame in section 2, an
 equally absolute rule in regard to confessions made to police officers which
 are presumed to have been made under conditions prohibited by s 24 that the
 s prohibited the admission
 s by the accused whilst in
 s rules but only the last rule

so enunciated, is much subject to the saving clause contained in section 26
 rendering confession admissible, if they are not made to the police officer but to
 a third person, 'in the immediate presence of a Magistrate' which affords a
 guarantee that the confession was not extorted, that the proviso contained in
 section 27 is not intended to qualify the absolute rules contained in ss 24 and
 26, which relates

persons whilst the

In short, I hold
 the same as the
 rule laid down by Lord Eldon in *Harvey's Case* 2 East P C 658 and that
 improperly
 a question of

in the case but indeed receives corroboration in respect of many points, then the confession should be held to be true as implicating the person making it unless he can make up a story to the contrary. It is not necessary that the confession of an accused should receive direct corroboration as to the fact that the accused was concerned in the offence. It is sufficient that there is such corroboration of the confession as to indicate that the accused had such knowledge of the circumstances of the offence as would suggest his taking

1-68 Ind Crs 17-9 O L. J.

whether by reason of s 26 or 25

information is set the pol
Amriddin v Emperor, 15 C
Crs 331 Section 27 of
also s 24 all three of which

Crown 11 P R 1915 Cr.

This section has got nothing
discovered is or is not relevant
1929 Lah 344 (F B) Recoveries etc

fact
I R
Sham

admissible in evidence, the fact
force, independently of the confession, would be admissible in evidence In re
Choda Achanna, 11 Weir 735-3 M H. C 318

peror, 36
oint out
to 27 of
it has
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It is 2

S. 27.

is a result of it. That is the present case. It cannot be admitted in evidence because the man was not in custody, which of course is thoroughly absurd. The result is that the fact discovered is not a fact discovered by the accused.

There seems to me to be nothing in section 21 or section 23 to prevent evidence being given. In consequence of something said by the accused I went to a certain place and there found the body of the deceased. In cases under section 27 the witness may go further and give the relevant part of the confession.

Any fact. The fact discovered by a statement must be a material fact and not a mental state induced in another person by that statement. *Emp*

to show how the fact that was discovered is connected with the accused so as in itself to be relevant evidence against him." *Per Straight C J in Queen v. Phipps & Babu Lal, 11 C. 137.* The test is whether the information received from an accused person in consequence of the information, and how much of the information was the direct cause of the fact discovered, and is such a relevant fact? *J Mad L Jour p 80 (Article).*

Deposed to. It is necessary, in order to bring a case of discovery within section 27, that the fact discovered should be deposed to by the person to whom the statement was made. *J Mad L Jour p 80 (Article).*

Discovered. The meaning, firstly, of known before to something, the existence of it.

It is in the latter, and not in the former, sense that the word is employed in section 27 of the Evidence Act, and this will be made evident upon considering the principle underlying the section. *J Mad L J p 80, 81.* From this definition of 'discovery' it follows that simple statements, or statements made while pointing out the scene where the crime was committed or while producing articles, and showing the connection of the place or thing with the offence, are not rendered admissible under section 27, but only statements preceding the finding, upon search or inquiry of articles or other facts connected with, or referable to the crime. *Ibid* see also *R v. Long Horn* 11 B H C R. 242, *R v. Latif*, 49 C 167=25 C W. N. 788. The word 'discovered' is very important. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of the fact no longer rests on the credibility of the accused's statement but rests on the credibility of the witnesses who depose to the existence of the fact. The rest of the

information is not admissible. But if the accused wishes to challenge the veracity of the statement that it was on his information that the thing was discovered he

words deposed to is concerned, they are still governed by the provisions of s 27 which must be construed as favourable to the accused as possible for it is a section which makes an exception against the accused contrary to the general sections, namely 25 and 26 which are in his favour. *Karam Din v. Emperor*, A I R 1929 Lah 333

soner
[vide

made a statement

344 (F B)

1929 Lah 333

the word 'information' cannot be used as synonymous with the word 'statement'. There is no reason why the word 'information' should have been used instead of the word 'statement' in the section if by 'information' statement alone was intended. The word 'information' as distinct from the word 'statement' connotes two things namely a statement or other means employed for imparting

that 'information' also includes knowledge derived by the person informed from the informant.

Statements made while production of murder made to a prisoner's saying "that is the place"
11 B II C R 242, *Emperor v. Rama Birappa* 3 B 12

If the prisoner himself
connected with the crime and
the act of production

or delivery its
producing statement
discovery in such
3 B 12 (17)
recorded confession
his pointing out
connected with the

Queen Empress, 11 C 635

27. In consequence of information. "Whatever be the nature of the fact covered, that fact must in all cases be itself relevant to the crime, and the connection between it and the statement made must have been such that the statement constituted the information through which the discovery was made, in order to render the statement admissible" *Pry v. Jora Hussi*, 11 B H. R. 242. It

read under section 111 c
property. In the course
the police where the pro

buried the property in the fields. The property was concealed, and with it in which the property was kept out the spot to the effect that he had buried the property there. It was contended that the statements were in custody of the police ment and "As regards 27, the property, it is said, was not discovered in consequence of the information given by the accused to the police, but by the act of the accused himself on the

in accordance the property police in motion accused to ing on the p and was the natural consequence of the information they had received from and so connect causa causam consideration thereby disco

Courts in dealing with proximate and remote cause of damage, namely, what followed was the natural and reasonable result of the defendant's act being of great importance that the law should, in a matter of such common occurrence, be distinctly settled, I am glad that my doubts have been removed, and this Court is not divided in opinion. But to avoid our judgment being applied to circumstances beyond its meaning and beyond the policy of the law to statements that cannot be regarded as proximate cause, I would refer to Lord Blackburn's decision, where he discusses Lord Bacon's Maxim "It is re

ulty of drawing Q. B. at p. 267, London and South case I am of his earlier usual course of section 27 was not ular parts of it ascertaining the v. Babu Lal, 6 A

R 51, where it was held that ct of the party, even there it was so information. But in *Empress v* a contrary view. In *Empress v*

laid down a distinction between See

a discovery by the act of the party, and one from his information. See also *Queen Empress v Babu Lal*, 11 A. 509, *Queen Empress v Aamcha*, 10 B 595.

The view as expressed in *R v Nana*, 14 B 260, has also been adopted by the Calcutta High Court. *Legal Remembrancer v. Chema Nashya*, 20 C. 413, *R v Pagree Saha*, 19 W. R. Cr 57.

The fact deposited as discovered in consequence of information received or confession made to the police by an accused person must be a fact relevant to the case in which the evidence is sought to be given if it is sought to be admitted in evidence under section 27. *Gokul Chamar v Emperor*, 105 Ind Crs 683=28 Cr L J 791=6 Pat 611. If arms are recovered in consequence of information supplied by the accused, the statement made by them are, admissible under section 27 of the Indian Evidence Act. *Ali Ahmed v Emperor*, 1923 Lah 134.

From a person When a fact is discovered in consequence of information
persons charged with an offence, and when others
could not be treated as discovered from the
could be deposited that a particular fact has been

information as relates distinctly
v *Ram Churn*, 24 W R Cr 36. It
J observed "I
where two persons
or 'they said that,'
that both the persons should speak at once, and it is the right of each of them to
have the witness required to depose
individually used. And I may
constable is having been made by
covered a certain fact or certain
on the witness so that there may be
In dealing with statements of this
to the discovery it is of the essence
should be precisely and separately state
this point, and the witness refused
paid no attention to it." See also *Rama Singh v Crown* 50 P R 1915=7 Cr
L J 12. Where all the accused persons jointly pointed out the place where
blood stains were found and subsequently the place where the dead body of a
person was discovered buried such evidence is not admissible at all against any
of the accused unless it can be shown who made the discovery first. *Faqira
v Emperor* A I R 1929 Lah 665. *Adam Khan v Emperor*, 101 Ind Crs
483=28 P L R 187=28 Cr L J 456. *Ditto v Emperor* A I R 1931
Sind 154. *Emperor v Shivaputhya* A I R 1930 Bom 244=32 Bom L
R 574.

In my opinion section 27 of the Evidence Act ought to be strictly construed

were in the custody of the police it is quite clear that the statements of the
persons other than the first person who made the statement can not be used in
evidence. The statement made by the first individual under section 27 and in
the circumstances described therein may be treated as evidence against him but
it is not allowable under the provisions of the law to treat the evidence of the
other persons who may have made statements of the description referred to in
section 27 as evidence admissible under the provisions of that section. This

persons who are

27.

based on the
untrustworthy
information

police that they
rebutts that pre-
subsequent discovery
a guarantee of
If therefore the
not of both have
subsequent to the

discovery are irrelevant. *Crown v. Suleman*, 10 S L R 7=17 Cr L J 35-36 Ind Cas 171.

Where a material fact, for instance, the manner in which a theft was committed, has already been discovered by some other means, an accused's subsequent statement relating to the same fact, while in police custody, is not admissible against him under s 27 of Act I of 1872. *Mann v. Empress*, 9 Ind Cas 232=12 Cr L J 35=3 P W R 1911

Where the Police succeeded in discovering property in consequence of information received from an accused, it is not competent to the Police to replace the property in the place where it was discovered, and to ask the other accused to produce the property, because there is no further discovery under s 27 Evidence Act as against the other accused. *Queen Empress v. Bishop*, 2 Bom L R 1089.

Accused in Police custody. The words used in section 150 of Act VIII of 1869, (which is re-enacted as section 27 of the Evidence Act, 1872) are "a person accused of any offence, or in the custody of a police officer." The only alteration in section 37 is the omission of the word "or" before "in custody," but this only shows that the operation of the provision is restricted to information from an accused person in custody of the police, and does not apply to information from accused persons not in custody of the police. *Per Oldfield J in Queen Empress v. Babu Lal* (1891) 13 Ind Cas 1513. The meaning of the words in the Evidence Act appears it is not in custody of a person.

(b) in custody but not accused besides under the circumstances mentioned

and is
Empress

tion in
“(

circumstances
person
but not accused (c) accused but not in custody, notwithstanding any discovery in consequence thereof

“(2) A confession made to a police officer by a person who is at the time (a) neither accused nor in custody (b) in custody but not accused, (c) accused but not in custody, is wholly inadmissible in consequence thereof. A confession is not in custody of the police, could not fall under the purview of the custody of a police officer (*Queen Empress v. Babu Lal*, 6 A 100=11 Ind Cas 1513=13 Ind Cas 1513).

became senseless” On receipt of the information the police went to

and found the corpse. *Held* that the statement to the police was not admissible. S. 2

tion contained in it unless the person who confesses is a person accused of any
King Emperor v Nga Aung Bu,
 402 Ind Cis 962. For the
 does not necessarily mean detention
 or confinement, but submission to custody by word or action under s 46(1) Cr
 Pro Code may be taken to amount to custody. Where the accused, who was
 suspected after the first report had been made, made a statement and pointed
 out the dead body to the police and his name was subsequently mentioned in
 second report. *Held* that the accused was not in any kind of custody at the
 time he made the statement and that it was consequently not admissible under
 s 27. *Jalla v Emperor*, 131 Ind Cis 93-32 Cr L J 650-A I R. 1931
 Lah 278

So much of the information as relates distinctly to facts thereby dis-
 as to the extent of the informa-
 ho first view is in favour of
 relates distinctly," so as to a limit
 ectly and immediately to the

discovery of the fact that the

Superintendent v
 'Relates to' means
 distinctly' means
 r 'undoubtedly'
 "clearly" or 'definitely'
 In *Queen v Pagasee Singh*, 19 W R Cr 51, the accused stated to the Sub-
 Inspecto (the deceased) by the neck, and
 pushed a plantain tree, and broke
 that the woman then and there
 remove the body took from it a
 concealed in the neighbouring jungle.

In consequence of this information, the accused was taken to the jungle pointed
 out by him, and he then produced from a concealed place, the necklace and

sed of the
 and might

be proved against the accused. So it is clear from this case that the Court in
 this case followed the first view. But *West J* in *Reg v Jora Haye*, 11 B H C
 R 42, took a
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prisoner has said, 'I placed a sword or knife in such a spot,' when it was found that too, though it involves an admission of a particular act on the part of the prisoner, is not admissible, because it is the information which is directly led to the discovery, and is thus directly and independently of any other statement connected with it. But if, besides this, the prisoner has said what would lead to put the knife or sword where it has been found, that part of his statements it is not furthered, much less caused, the discovery, is not admissible. T

submitted that the case of *Queen v. Pajares Siba*, 19 W R 51 is not reconcilable with the principle laid down in *Reg v. Jora Haspi*, 11 B H O R 247, *Empress v. Rama Naraya*, 3 B 12, *Queen Empress v. Babu Lal*, I. L. R 11 503, *Shikhar v. Queen Empress* 11 C 675; *Queen Empress v. Commr Siba* 12 W 153, *Queen*

Adul Shikhar
to the assault.

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refers to his taking the ornaments and concealing it in the jungle" 5 W R 141
Four Article

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councils and at the Bench at the of very eminent Judges of the High Courts
in India. A I R 1929 Journal 101

In *Sulhan v. Emperor*, A I R 1929 Lah 311 (F B) the question of the admissibility of an incriminating statement made by an accused while he is in the custody of a police officer was considered. The prisoner in that case was tried for the murder of a boy who

his disappearance but the ornaments recovered from a well. At the trial the Superintendent of Police stated the fact that in consequence of information received from the prisoner he had recovered from one *Alah Din* silver *karas* (bangles) which were proved to be the *karas* which the boy was wearing when he was last seen. The witness was then asked to disclose the information communicated to him by the accused which caused the discovery of the fact deposed to by him, and he stated that the prisoner had during the investigation, made the following statement "I had removed the *karas*, had pushed the boy into the well and had killed the boy with *Alah Din*." The trial Judge

Tek Chand and *Aga Haidar J J*
referred to the Full Bench, the

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cludes, not only the physical fact which can be perceived by the senses, but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in section 27. The phrase 'fact discovered' used by the legislation refers to a material and not a mental fact. The fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing, or it may be a material thing in relation to the place or the locality where it is found. Taking the present case as an illustration, the fact discovered is, not the *larcas simpliciter*, but the possession by Allah Din of the property of the accused.

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fact. This condition follows from the phrase 'fact discovered in consequence of information' and also from the expression 'thereby discovered' used by the

The information

pointed out, the wording of the section shows that the requirements of both the conditions specified above must be satisfied before an incriminating statement can be received in evidence. These conditions when combined lead us to the conclusion that the fact is provable which was the fact. Anything which is

it does, an exception to the general rule, must receive a strict construction but also conforms to the principle upon which the exception is founded. The real difficulty arises in applying the test to the facts of a particular case. To illustrate this, let us take the case of a confession. A confession must be separated from the accused by the accused. It is of judicial opinion, and it has been laid down in some judgments that the

S. 27. whole of the statement can be given in evidence, and that it is not competent to the Court to split up the language used by the accused in conveying the information, to strike out some words which are objectionable and to admit only those which relate strictly to the discovery. There is considerable force in this argument. It is a brown round an accused person is dependent upon the accuracy of the information which conveys the information. Suppose a prisoner on being asked about the weapon of offence says "I buried a hatchet in my field. I killed A with it." Now, it is indisputable that the recovery of a hatchet from the field renders only

be let in as soon as it is unalleged with the admissible statement. In examining the extent of the statement, which should be provable on the ground of being the proximate cause of the discovery, the Courts must have regard to the composition of the sentences in which the statement is concluded but to the substance.

"The information received from an accused person is usually proved by quoting the words used by him, and this is certainly desirable in order to ensure accuracy. But it is not always possible to observe this salutary rule. If the witness, to whom the statement was made, has not reduced it to writing and does not remember the exact words used by the accused, he can depose to it only in his own language. And there is no valid reason why he should not be required to do the same, if the admissible portion is so mixed up with the inadmissible one as to render it necessary to give the former in the words of the deponent." *Regina v. Gould*, 9 C. & P. 361, see also *Santa v. Emperor*, 19 Ind. Cas. 150, *Tara Singh v. Emperor*, 24 P. R. 1691 Cr., G. 1915, *Gula Khan v. Emperor*, 24 P. R. 1691 Cr., G. 1915, P. L. R.

In a recent Calcutta case, it is concerned the more so that it appears to be the section and it to go in as correct view of (think it can containing a drawn between

wrongly admitted this statement in evidence and that what should have been admitted in evidence amounts to evidence. The question then what was the statement which is therefore admissible in evidence. To accept the argument of the learned advocate as well as the view expressed in *Superintendent v. Bhajoo* (1913) 10 Pat. 153 the A. I. R. 1931 Pat. 145 = 10 Pat. 153 the that case the accused said to the Police that he was the accused and that what should have been was contended that the Sessions Judge had body The police former Superintendent v. Bhajoo

confessional portion thereof given by the prisoner which relates to the fact includes not only the concrete thing discovered by the investigating officer, but also its connection with the crime of the information can be there is no legal justification for defeat the very object with

must be proved in
Emperor, A I R 1914
Man v Emperor,
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the well is wholly inadmissible, as it relates to a separate matter and had no connection with the possession of the ornaments by *Alla Din* which was the only fact discovered. Nor do I think that the statement that the prisoner had removed the *Laras* from the boy can be regarded as immediate cause of the discovery. A man may remove the ornaments from the boy, but he may not give them to

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is admissible
Man v Emperor,

(1914)

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whole confession of a prisoner
where the confession includes a
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the discovery of the weapon
Sogamuthu Padayachi, 50 M.
Bhan v Emperor, A I R 1936

expressed by *Forde* and *Jaisil JJ* in the minority judgment of *Sukhan v.*

also Emperor

of Police that
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Held that

of one transaction and the words used by the accused were admissible in evidence *Bahadur v Emperor*, 88 Ind Cas 7-26 Cr L J 1063-A I. R 1925 Sind 389

A statement made by an accused may be proved under section 27 of the Indian Evidence Act, 1872, so far as it relates to any material fact discovered in consequence, statement was made
Naina Malai ing an information by
accused under ion must have had the
direct effect of y *Ramasami Boyan*,
In re, 11 L W 8-54 Ind Cas. 479 The accused made a statement during

who is afterwards proved to be a dacoit is not the
aning of s 27 of the Evidence Act. The test of
of the Evidence Act, if an information received
from an accused person in the custody of a police officer, is whether the fact so
discovered was a direct natural and necessary consequence of the information
so received *Salam v Emperor*, 11 N L R 193-43 Ind Cas 111-19 Cr
L J 79

Under s 27 it is legitimate to record evidence that an accused person said
"I will point out certain property" if such statement leads to a discovery, but it
cused said "I will point out
are of the booty in the dacoity"
W R (1918) Cr-44 Ind Cas
The King Emperor, 155 P L R.

1908-31 P W R 1908 Cr

It is not all statements made by an accused person connected with the
production or finding of property which are admissible. It is only those
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27. *Emperor, A I R*

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information received, may be proved *Illahbuz v Emperor, A I R 1911*
175 Such portion of the confession made to the investigating officer as leads
to the discovery of any fact are admissible under section 27 of the Evidence Act.
Jagann Dhanuk v Emperor, 5 Pat 63-93 Ind Cas. 884-7 Pat L T 33-37

S. 28. must be shown, it is as well to have continued until the contrary is shown *Wigmore* § 855, see also *R v Cleverton*, 2 F & F 533 This inducement may be removed by subsequent caution *R v Harnbrook*, 1 Cox Cr 51 *R v Hylton*, 1 Cox Cr 361, *R v Collier*, 1 Cox Cr 77; *Berjman's Case*, 1 Ir Cr C R 171 *R v Bryan*, Jebb Cr 157, *R v House*, 6 C & P 101

Can inducement be irrevocable? The next question raised by *Wigmore* is whether there is any situation in which it cannot be shown that inducement, once offered has been brought to an end? In answering this question he says 'There is nothing permanently irrevocable in an inducement, whether it has been brought to an end is, in all respects, always open to inquiry' *Wigmore* § 855

A person who has offered inducement can put an end to it. It has not been decided specifically whether the same person may put an end to an inducement of his own making. But there is no reason why he cannot. *Wigmore* § 855. Where a Magistrate told a prisoner that if he did not strike the first blow and would tell all he knew, he would use his influence to protect him. He afterwards communicated to the prisoner a letter from the Secretary of State declining to give pardon. C & P 221. Nor do I think that this declaration with Magistrate after given by the Coroner must be taken to have completely put an end to all the hopes that had been held out.

Inducement offered by one person and confession made to another. 'There is on principle no reason for assuming that a promise or a threat made by one person will be treated by the accused as equally to be attributed to some other person who had no share in the other's conduct and shows no power or inclination to corroborate his promise or threat. Nevertheless, if the inducement may on the facts, prove to be in effect the second person's as much as the first one's. It should thus be a question to be determined in each case, no general rule can be laid down. *Wigmore* § 855, see also *Curly's Trial*, (Ire) 20 Har St Tr 889 *R v Bell*, *McNally*, Ev 13 *R v Tyler*, 1 C & P 129, *R v Cleverton*, 2 F & P 223

What suffices in general to end an inducement. If the impression produced by the promise or threat is clearly shown to have been removed—e.g., by lapse of time or by an intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement—a confession subsequently made will be strictly receivable. *Philp* Ev F. 20. Where a prisoner confessed some

port in 1871 *R v Bate* 11 Cox Cr 171

Magistrate had told the prisoner that, if he would make a disclosure, he would do all that he could for him. The prisoner after he was committed to the statement to the turnkey of the prison who had held out no inducement to him.

prevent the superior from carrying his promise into effect' *Russ v C* p 2184, S, see also *R v Gilham* 1 Mood 136, per *Littledale J* Where a collecting pan-

removed therefrom *Imperoi v Ganesh*, 74 Ind Crs 264=50 C 127, *Queen v Luchoo*, 3 N W P 86, *Reg v Navroji*, 9 B H C R 358

In the opinion of the Court It is for the Court to decide whether the impression caused by inducement threat or promise has been fully removed So where promises or threats have been once used of such a nature as to render a confession inadmissible, all subsequent admissions of the same or like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences or from other circumstances there be good reason to presume, that the delusive hope or fear which influenced the first confession has been effectually dispelled *Joy on Conf* 69, *R v Hewitt*, C & Marsh 534, *R v Cooper*, 11 C & P 534, *R v Rosa* it appears to the satisfaction

away with before the confession was

Fv § 221 So, where the prisoner had been induced, by promises of favour to make a confession, which was for that cause excluded but about five months by two Magistrates that he made a full confession this Case, 5 Halst 180 In this

the length of time intervening or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained were entirely dispelled *Guild's Case*, 5 Halst 180, *R v Chererton* 2 F & T 833 But other wise the evidence of a subsequent confession made on the basis of a prior one unduly obtained will be rejected *Com Harman* 4 Burr 269 In the absence of any such circumstances the influence of the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected *State v Roberts* 1 Dev 259, *Greent Ev* § 221 If there

2 Q B 12=62 L J M C 93=17 Cox Cr 641, See also *R v Jose* 18 Cox Cr 717=67 L J Q B 289 *R v Smith* (1897) *Loscree Cr* Ld 47

29 If such a confession is otherwise relevant it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc

29. when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Rule criticised. 'The rule of procedure' says *Mr. Chamberlayne* "which rejects so-called 'involuntary' confessions induced by threats or promises by those in authority is based entirely upon an assumption. In reality, like other rules of procedure, it is a mere law controlling the normal exercise of the law. As at present conducted it proceeds upon the assumption that the accused, and even, as has been suggested, frequently operates against him by substituting private, irresponsible investigation for responsible official inquiry. The rule assumes that those in authority over legal criminal proceedings ought, in the public interest, to refrain from placing pressure upon the free will of their prisoners. What injury is done to the public interest by the admission of private persons is none."

actually a person in he sees fit in connection by way of hope or fear he not one as to a benefit or injury connected proceedings it is not important that it be held out to the accused by one in authority. Neither situation brings into operation the special work of procedure or substantive law in this connection. This consists in rejection without weighing the statement itself."—*Chamberlayne's Ev* § 1533.

Scope. Confession procured by deception or under promise of secrecy are not, on this account alone, rendered inadmissible. This, of course applies to confessions which otherwise satisfy the conditions prescribed for admissibility of obtaining a confession, regard to it *R v Shar* confession inadmissible if not obtained by fraud or

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Promise of secrecy. 'If no inducement has been held out remain the charge,' says *Mr. Taylor*, "It matters not in what way the confession has been obtained." *Taylor* § 881. It is not necessary that it should have been the prisoner's own spontaneous act. So it will be received, though it were induced by a solemn promise of secrecy, even if *R v Shar*, 6 C. & P. 372; *Com v Knapp*, 9 Pick 496, (54- prisoner had been committed on a him, 'I wish you would tell me how you murdered the boy, pray prisoner said "Will you be upon your oath not to mention what I tell you. The other prisoner went upon his oath, and he hoped, if he told that he might have made a statement. It was

в. 1538^г (а)

Deception A free and voluntary confession is not inadmissible because it was originally obtained by an artifice practised on the accused by officers having been in charge, or by other persons, if the means employed were not calculated to cause him to make an untrue statement. *People v McMohan*, 15 N Y 384

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Act expressly says that a confession made in consequence of deception is not to be excluded." The question, however, is one of importance. The main point is whether or not it is true? (*People v McMahon*, 15 N. Y. 2d 607, 209 N.Y.S.2d 847, 186 A.2d 881). It turns, not so much upon the facts as upon the law. The motion to obtain a new trial was denied. The charge was on the ground that the truth of the guilt of the officer, who was a police officer, was made to him, or nature of decoy were in promise function.

- 29 always been in regard to confessions made by a person when under arrest to the authority over him, they have not gone so far as to exclude them simply because they were procured by deception provided they were voluntarily made. They are careful, however, to leave the credibility of the witness who procured the deception and the circumstances under which the confession was made to the consideration of the jury. In *Imeri* it has been held that a confession procured by a person who by falsely representing himself to be an attorney obtained the confidence of the prisoner, was inadmissible. *Cotton v State*, 87 Ala. 110; *Comwealth v Jones*, 77 S W 63. "A man who will deliberately say, 'I betrayed the ... every means in confession of ... the downfall of ... of a very high thing is really good evidence' ... where *Howland* ... but as a matter of law called forth an admission." Cr 228.

False personation. A confession is none the less admissible because of the person to whom made.

sympathetic fellow prisoner. *Howland* ... he a inadmissibility of the confession is ... Li § 1538(b)

Confessions overheard statements made while asleep. A person who may overhear the remarks of a prisoner made to himself or to another person as his wife or an attorney or spiritual adviser, who is incompetent as a witness to privileged communications may testify to what he has heard. *Rea v State*, 6 C & P 510; see also *Queen v Sajina* 7 W R Cr 36, *R v Gardner* 11 Cr A R 265. But not to incriminating declarations made during sleep for the declarant is then unconscious of what he was saying. *People v Foban* 13 Cal 40 (Am), *R v Elizabeth* Kent Sum Ass 1839, *Gore v Gibson* 13 W & W 623, *Best* 11th Ed 511. A confession constituting a part of a prayer may be proved by one who overheard it, though he may not be able to prove the whole prayer. *Woodford v State* 85 Ga 69 (Am). A confession made to another prisoner, under the erroneous impression that one prisoner cannot testify against the other, is not for that reason inadmissible. *State v Mitell*, Phil (N Car) p 147 (Am). A confession to a fellow prisoner in jail, procured by the latter's spirit to be rejected. *v State*, 50 Ga was again charging H were read by a sergeant to the three together, purposely to the admissions, though evidence of what then took place is strictly admissible to the trial Judge, if satisfied of such a purpose ought to exclude it. *R v Gardner* 11 Cr A R 265, *R v Grayson* 16 Cr A R 7, *R v Pilley* 16 Cr A R 100. *R v Turner*, 19 Cr A R 191.

Misleading inducements. Illegality. Not only may deception, treachery, any unfair treatment says Mr Chamberlaine "be employed for the attainment of an end."

reliable and trustworthy, merely, because obtained by means of an ... violation of the prisoner's privilege against compulsory self incrimination is

entirely without support in legal analogy. The confession, viewed as extorted by one act of duress, stands in a different position. It is not the act of the declarant. Accordingly, he is not responsible for it." *Chamberlayne's Ev* § 1539. S. 2

When he was drunk. Confessions made by the accused when under the influence of liquor are not thereby rendered inadmissible. *R v Spilsbury*, 7 C & P 187. In the last named case *Coleridge J* said: "I am of opinion that a statement made by a prisoner while he was drunk is not therefore inadmissible, it must be obtained either by hope or fear. This is matter of observation for me, upon the weight that ought to attach to this statement when it is considered by the jury." This is the rule, even where the intoxication was produced by liquor given to him by the officers having him in charge for the sole purpose of

cated as to be incapable of understanding what he says or does his confession should not be used against him. *Com v Howe* 9 Gray (Mass) 110. *Eschwege v State*, 25 Ala 30. The question as to the mental condition of the accused at the

the confession the Court would not submit the confession to the jury at all. *McKelvey's Ev* § 92.

Some recent cases of America, however reject confessions thus obtained because of the trick practised. But the general rule has been sustained even where the accused was suffering from *delirium tremens* if he was mentally and physically able to describe past events and to state his own participation in the crime. The intoxication of the accused at the time of making a confession may

be used as evidence.

It is by no means for with men of a moral exaggerated state permitted to show that statements made with him he has done this the him speaking that he appear. *11 Cr Ev* § 136.

this is subject to some exceptions which will be found collected in the case of *Volton v Cimroux*, 2 Exch 487, *Best Ev* § 529.

Confession in answer to questions. A confession is also not to be rejected merely because it has been elicited by questions put to the prisoner. *Taylor* § 841. But this statement of law must be read subject to the provisions of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

form of the question is immaterial even though it is a sure the prisoner. *R v Hill* 1 Moo C C 152, *R v Thornton* 1 Moo C C 27, *R v Kerr* 9 C & P 179, *per Park J*. A confession, in other respects admissible is not invalid because it is not the spontaneous utterance of the prisoner. The fact that confession was obtained by the employment of peremptory questions alone exclude it, (*State v Pennell*, 113 Iowa, 691) but the practice of confession by putting questions after questions to the accused is conducive to the procurement of truth, and the mode in which the

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was elicited may always be considered by the jury to determine what they shall hold it. *Underhill Cr Ev* § 110. In *R v Ellis, Ry & Moo* 12, *Littledale J* admitted a statement of an accused on examination before a Magistrate without threat or promise but upon questioning and after refusal to allow counsel. The case was decided by following an unreported ruling of *Hobbs J* and disapproving *Wilson's Case* 1 & *R v Wilson*, Holt. N P 30, where *Richard C B* is following such statements and 'An examination of itself implies an admission to speak the truth, if a prisoner will confess that to so voluntarily. *Mr J*, also relies his authority as to the practice in his book on confession. *Joy Croft* 104, 10 also *o R v Tully*, 5 C & P 550, *R v Lucas* 7 C & P 177, *R v Wheel*, 8 C & P 30, where this practice was accepted indirectly. An answer given by the prisoner to a question put to him by a Magistrate was rejected by *Parke C J* in *R v Lister* 111, 6 Cox Cr 303. *Queen v Adair* 1 B L R 15.

The mere fact that a statement in a confession was elicited by a question put to the Magistrate or other official does not make it irrelevant as a confession. But the fact may be very material to an enquiry as to whether the confession is voluntary or not. *Bharitra Kumar v The Emperor*, 14 C W N 1114-37 C 467. In *King Emperor v Promotha* 30 C L J 503 the Court in rejecting a confession obtained by continued questioning observed 'His confession in our opinion cannot upon the evidence made by the prosecution, be said to be voluntary. The evidence is that he was kept at a little distance from the Post Office in charge of a head constable and was being questioned by the Sub-Inspector and that after being in that condition for 3 or 4 hours, to do the words of the learned Judge 'under the continued questioning to which he was subjected he finally broke down'. If there is reason to think that the confession was induced by the pressure of questions by one in authority or in order to escape from his custody it should be rejected. *R v Knight* 20 Cox 711-69 J P 168.

In England the controversy on this point is now closed by *Reg v East* (1900) 1 K B 692-76 L J K B 658 where Lord Alverstone C J said 'In our opinion it is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial. There are many cases in which the prisoner is entitled to give an explanation as to anything found upon him, and he may be able in answering the question to say and show that the thing found was his own property. In our opinion *Reg v Grim* 15 Cox C 626 was not properly decided. It is commented on in a note printed at the end of the report. The decision has not been followed to its full extent as appears from *Reg v Drachenbury* 17 Cox C C 678. The statement of law as set out in the report is too wide and requires qualification. So this case practically overrules *Reg v Gaim* 15 Cox C C 556 and *Reg v Vab* 17 Cox C C 589. In *R v Miller* 18 Cox Cr C 54 *Hawkins J* said that it was impossible to discover the facts of a crime without asking questions, and as he held that the questions were properly put after due warning he admitted evidence of defendant answers, saying that every case must be decided according to the whole of the circumstances. *Roscoe Cr Ev* 10, see also *R v Hirst* 18 Cox Cr C 374. *R v Hirst* 19 Cox Cr C 16, *Lewis v Harris* 24 Cox Cr C 66-110 L T 337. All these authorities were considered in *Abraham v Reg*, 83 L J P C 185-(1914) A C 590-91 Cox C C 174. A private Indian regiment murdered one of the officers. Shortly afterwards, while he was in custody the commanding officer asked him 'why have you done such a senseless act?' and he replied 'Some three or four days he has been abusing me, and without doubt I killed him'. The confession was admitted. Lord Sumner in delivering the judgment of the Judicial Committee (Lord Haldane L C Lord Atkinson, Lord Shaw Lord Moulton and Lord Sumner) said 'if the matter is one for the (trial) Judge's discretion depending largely on his views of the impropriety of the questioner's conduct and the general circumstances of the case' it was not improperly criticised. 'Then after reviewing a large number of cases, he added 'The English law is still unsettled strange as it may seem since the point is one which constantly occurs in criminal trials. Many Judges, in their discretion, exclude such evidence, for they fear nothing less than that the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English Law ought to be, much as it is to be

desired, that the point should be settled by authority, so far as a general rule can be laid down where circumstances so greatly vary. S.

Want of warning. A voluntary confession is evidence, to whomsoever it may have been made, that what he might say was not so warned. *R v Long*, 6 C & P 179; *R v Empress v Ucer*, 10 C

of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him." See also *Queen v Nobodoe*, 1 R. L. R. Cr 15-15 W R Cr 71. Answers to questions under that section are admissible in evidence, even if the Magistrate has omitted to warn the accused that he need not answer. *Dingo Roy and others*, 16 W R Cr 21, 5 M & H C. App 9. But sub-section (3) of section 161 of Criminal Procedure Code enacts "A magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence shall record any such confession unless, upon

he has reason to believe that it was made

Act XVIII of 1923

§ 775 Now the

Balram Singh v

1, 6 Lah 183-26

Hari, 30 C W N

Luc Sin v King

Lah 325 A state-

ment of an accused, a suspect, made at an inquest before a Coroner is clearly admissible, either as a confession under s 16 or as a statement made by a party to proceeding under ss 18 and 21 of the Evidence Act. As regards the objection that such a confession is not relevant in as much as the Coroner did not warn

Pendse referred to section 161 of the Criminal Procedure Code as containing a general principle to the contrary. But that is a special enactment applying only to certain statements made in particular circumstances contemplated by s 161.

R v Ellis, Ry & Moo 432 and *R v Gilham*, 1 Mood Cr C 186, 191 are more

30. When more persons than one are being tried jointly

Consideration of proved confession affecting person making it and others jointly under trial for same offence

for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such

S. 30. confession as against such other persons as well as against the person who makes such confession.

* *Explanation.*—"Offence" as used in this section, includes the abetment of, or attempt, to commit the offence.

Illustrations

(a) A and B are jointly tried for the murder of C. It is proved that A and B murdered C. The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C, and it was murdered by A and B, and if

This statement may not be taken as evidence against B as B is not being jointly tried.

Principle. This section is entirely new. There was no such provision either in Act II of 1857, or in Act II of 1861 and 1872. Before the passing of the Indian Evidence Act, 1872, the confession of an accused person was only evidence against himself. (Queen v. Hall, 11 Cr. 10 W. R. 51 (r) and it could not be taken as corroborative evidence of any other evidence at all, against any body other than himself. Queen v. Brindley, 11 W. R. 35 (r). So the confession of one prisoner could not be used as corroborative evidence against another. (Queen v. Brindley, 11 W. R. 35 (r). "Until the 19th century, the confession of an accused person was only evidence against himself. It could not be taken as corroborative evidence of any other evidence at all, against any body other than himself. Queen v. Brindley, 11 W. R. 35 (r). So the confession of one prisoner could not be used as corroborative evidence against another. (Queen v. Brindley, 11 W. R. 35 (r). "Until the 19th century, the confession of an accused person was only evidence against himself. It could not be taken as corroborative evidence of any other evidence at all, against any body other than himself. Queen v. Brindley, 11 W. R. 35 (r). So the confession of one prisoner could not be used as corroborative evidence against another. (Queen v. Brindley, 11 W. R. 35 (r)."

by the confessing person
it were of the sanction

* This *Explanation* was inserted in s. 30 by the Indian Evidence Act Amendment Act, 1891 (3 of 1891) s. 4.

another, but
 confessions
 guaranteed
 The reason
 character is :
 Judges are
 provision, that, when more persons than one are tried for an offence, and one of
 them makes a confession affecting himself and any other of the accused, the

for the Indian Evidence Act, ho
 ion, in fact, was one of those rules
 which though well adopted to
 trials for Jury, are meaningless and out of place on occasions where the functions
 of Judge and Jury are conf
 to consider whether the

prosecutors and under the present system it is better to follow the wise advice
 of the writer cited by Justice Cunningham, where he says 'The policy of the

dangerous innovation *Per Glover J in Queen v Jaffir Ali*, 19 W R 57 (64) Cr ;
Queen v Sadhu Mundle, 21 W R 69 (79) *per Phear J in Mad J Journal*
 and was a
 confession
Lalaram, 81 Ind Cas 817

Sadhu Mund

N S. 19

section 30, Act I of 1872, be 'considered' as against other parties then on their
 trial with them, but such confessions, when used as evidence against others,

trial jointly for the same offence, can be used under s 30 of the Evidence Act

30. The section is not to be treated as though the words "at the trial" were inserted after "made" and the word "recorded" substituted for "proved." *Queen Empress v Tunga*, Rat. Un Cr C 510 = Cr. Rg 30 of 1890. Confessions made by an accused person may be considered against persons who are tried with him, but they cannot be accepted as evidence of any fact necessary to constitute the offence. *In re Kalyappa Goundan*, 2 Weir 711. In order that a confession of an accused person may be admissible as against the other accused tried with him, it is not necessary that the confession should have been made in the latter's presence. 2 Weir 745. When this section lays down that the Judge may consider a fact in certain circumstances it plainly declares that fact to be relevant in those circumstances. *Gobraya v. Emperor*, A. I. R. 1330 Nag. 243 (F B) = 26 N L R 229 = 125 Ind Cas. 673.

Section 30 does not refer to statements made at the trial but the statements made before and proved at the trial. *Gounda v. Emperor*, A. I. R. 1929 Mad. 28; *Emperor v Mahadev Prosad*, A. I. R. 1928 All 322 = 45 A. 323, *Empress v Ashutosh Chakravarty*, 1 C 183 = 3 C L R 270, but see *In re Bal Reddi*, 33 M 302 = 22 Ind Cas 167 = 15 Cr L J 13, where *Auling J* held that there was no reason why confessions taken into consideration in *J. in Emperor v Mahadev*.
 accused person is entitled
 called upon for a defence
 in no mere form but with certain exceptions closes the door to any further evidence against him. "If a prior confession is to be proved, he can attack it by cross examination of the witness who proved it."
 the dock after the prosecution case has closed.
Per Waller J in Gound v Emperor, sup.
 Act is not limited to cases where the

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 accomplice evidence
 K. B 658, a c
 to lay down r
 applicable to
 tion does not
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 3 Cox C C 1
 Magistrate w
 evidence thus
 person to wh

Magistrate's Court when examined as a witness in the Sessions Court. *Queen Empress v Nagu*, A. W. N 1891, 184. Section 30 merely enacts a special exception to the general rule that a confession (admission) can be proved (only) against the person who made it. It does not limit the operation of s. 32. *Illius ratio* (b) to section 30 cannot be construed to have this effect. *Aga Po Im v King Emperor*, U B R 1906, Evidence 3 = 5 Cr L J 300. Where an accused person makes a confession, the most that could be taken into consideration on such a statement against a co-accused would be, under sections 27 and 30 of the Evidence Act, so much of the information as was the immediate cause of the discovery of

some relevant fact against him. *In re Sankappa Rao*, 18 M. L. J. 66-31 M. L. J. 127-3 M. L. T. 270-7 Cr. L. J. 325. Prior to the Evidence Act the rule not

accused. *Shambhu v. Emperor* A. I. R. 1933 All. 228-1932 A. L. J. 163

L. W. 474

confession of one prisoner
the confession, applies
prisoner tried at the

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the other accused and the confession was evidence against them all. *King v. Emperor* v. Dep., 37 A. 347

A person escaping from custody during the trial but, before charge, who has been tried separately after re-arrest, cannot be said to have been jointly tried with the person whose trial, from a stage prior to the charge, was separate. *Hassan*

abatement of it before hand and being present during its commission, were held to be jointly

S. 30. tried for the same offence within the meaning of a 30 P R person;

mitted the murder
ed upon his trial—the
used the statement of
the first. Held that
accused person's statement was not admissible against the first, either under
section 327, Cr Pro Code, 1872, or ss 30 and 133, Evidence Act. *Croft v*
Jhobu, 13 P R 1878 Cr.

s when the confes-
he be called still join
r this section again t
co-accused. In *Acq v Kalu Patel* 11 B R C R 116. Cr et al charged w

when the Assistant Judge, in framing his judgment took his evidence into con-
sideration. *Imperatrix v Balu Patel*, 5 B 63; *Venka Sams v Queen*, 7 W 10
Imper 1895

in order to
Pachya, 19 E
Purdu, 1895 A

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the trial without convicting those of the accused who pleaded guilty, yet, it is
unfair to defer convicting them merely in order that their confessions may be
considered against the other accused who are being tried with them. *Queen*
Empress v Paltua, 23 A 52=A W N 1900, 192; *Emperor v Akoraj*,
30 A 540.

Where the statements of two of several co-accused persons followed their
plea of guilty, held they were not entitled to be considered as evidence against
the other accused persons and that, in those circumstances, they ceased to be
statements of persons. *Queen*
plea of guilty. *Queen*
v Shuldham, 44 P

vermal, 33 C 410, 1899

essarily end as soon as he pleads guilty
ther

of these courses has been expli
guilty is left in the dock merely to
him, though the Court intends
In such a case, it will not be fair to allow his confession to be considered as

taken into consideration against them under s. 30, Evidence Act, appears to

he is still an accused person and is, therefore, not a competent witness against

trial was good. *Sukdev v. Emperor*, 9 C. L. J. 291=13 C. W. N. 552.

A. I. R. 1928 Lab. 880=111 Ind. Cas. 387=29 Cr. L. J. 835; *Kanhaya v. Emperor*, 15 P. R. 1911=12 Ind. Cas. 381=51 P. W. R. Cr. 1911; *Fakhruddin v. Emperor* 302;

A
confessed
Judge subsequently conceded the charge against A into one of abetment B,
who was
new trial.
Evidence

could not be allowed in appeal since the two charges were so nearly related, and
there was no such material prejudice as would under ss. 447 to 449 of the

S. 30.

is tried but of a minor offence, it does not satisfy the requirements of the Evidence Act. In a case but not in the present case the confession was inadmissible. 70 = 61 Ind Cas 793 of the Cr Procedure (co-accused, the provision to a case like the present. *Ambirulla v Empress*, 22 C W N 403.

Two persons were jointly tried, the former for criminal breach of trust and the latter for the abetment of that offence. The only evidence against the latter was the confession made by the co-accused, such unsupportable evidence made the trial alone, *Thalur Singh v Jata Singh*, A W N 1831, 164.

An accused person and another co-accused were tried together for an offence. The accused, though only liable for abetment of the offence, was found to have been present at the time of the commission of the offence. Held, that under s. 114 I P Code, the accused stood in the same position as if he himself had committed the offence; that his trial with the co-accused was proper, and that the confession made by the co-accused in such trial could be taken into consideration under s. 30 of the Evidence Act against the accused. *Thalur Singh v*

having before it the definition of abetment in enacting s. 30 Evidence Act and in the latter section included the "abetment of an offence" also if the intention really was that section 30 was to be so understood. But if the offence abetted is committed as the result of an abetment and the abettor is present at its commission, the abettor must be held to have committed the substantive offence. *Queen Empress v Kaldin*, S C 143 Oudh (but now this objection has been removed by adding to the explanation by Act 3 of 1891); but see *Teja v Empress*, 51 P R

pa, Rat Un Cr ~
Cr. C 450

3 tried under s. 411 I P
457, cannot be considered
P. Code, are distinct of now

within the meaning of s. 30, Evidence Act. *Nga Po Tok v K E, U B. & R 1911*,
4th Cr 159 = 20 Ind Cas 136 = 14 Cr I, J 376. Where two persons were

, though it appeared to the Magistrate
charged with abetment of the offence with which
Empress v Hira Lal, A W N 1893, 63, see also

Maya Singh v. Empress, 9 P R 1886 Cr.; *Nur Ahmed v Crown*, 8 P R 1874
Cr., *Badri v. Queen Empress*, 7 M. 579, *Empress v Bala Patel*, B 63 = 5 Ind

Ghena v. Emperor, A. I. R. 1932 Lah. 180.

Confession. This section must be strictly construed. It makes a clear distinction between an admission and a confession. It is only under this section that the confession of one of two or more accused, jointly tried for the same offence, can be taken into consideration against the rest. It must be a confession to be so admissible, that is, it must affect both the person confessing and must not be a confession of being an abettor. It is one

whom it is tendered" also *Empress v. Dary* A 114; see 9 W R 10.
Queen v. Belat Ali, 19 W R 10.
Queen v. Khukree Oara
Queen v. Naga, 23 W R.
Choudhury, 25 W R.

for which they are being
 to the section abettors
 L. R. 1931 Mad 177

A statement by an accused person consisting of the vague accusations of a

who was not charged with
 5 Cr The confession of a
 he does not substantially
 implicate himself to the same extent as the other accused, but on the contrary

Aeshub Bhonia, 25 W R Cr 8, see also *Kusir Bap v. Emperor*, 14 Cr L J.
 586=21 Ind Cas 378 A confession must be one of guilt. The accused must
 incriminate himself *Bom v. Emperor*, 1932 Bom 107=91 Ind Cas
 v *King Emperor*,
 Where a person
 makes a confession
 Evidence Act.
Emperor v. Aunaji, 26 Bom L R 614=A I R 1924 Bom 445 Merely because
 a confession by one of the accused is not a complete and detailed confession up

S. 30. to hilt, it cannot be rejected against the co-accused *Lalhan v Emperor* A. I. R. 1924 A. 511. A statement by an accused that he and his co-accused and the deceased in exercise of their right of private defence, is in no way a confession and cannot be taken into consideration against the accused *Lalhan v Emperor*, 6 = 85 Ind. Cas. 371 Confes. made before a Magistrate, Sec. 30, Cr. P. Code, even though made

the conviction of persons based solely on a retracted confession of a co-accused which does not implicate the confessor to the same extent as the co-prisoner *Upendra v Emperor* (1918) Pat 175-46 Ind. Cas. 842. Statements made by one set of prisoners, criminating another set of prisoners, when each individual prisoner made a case for himself in which he was free from any criminal offence ought not to be taken into consideration under s. 30 of the Evidence Act against the prisoner of the second set, when the two sets although tried together were tried upon

Queen v. I

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this section

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L. R. 201-2 Bom Cr C 102-15 Cr. L. J 433.

Made "The word 'proved' in s

hand" Per

Imperatrix v

section 30 is

word 'made' and the word 'recorded' substituted for 'proved'. that therefore

Cr. L. J 305-21 A. L. J 179-(1923) A. I. R. All. 323-45 A. 823, see *Queen Empress v Pirbhu*, 17 A. 524; *Queen Empress v Pailua*, 23 A. 53. It seems to me that evidence at the trial confession, and to by the section "At before a charge in restricted to an unretracted confession on which a confession is proved it is

v. P. A. 1911 Cr. = 22 P. W. R. 1911 Cr. = 13 Cr. L. J 267, *Sri Ram v* 2 A. L. J 100-2 Cr. L. J 59.

accused *Raj Kumar v. Emperor*, A. I. R. 1929 Pat. 473-9 P. L. Ind. Cas. 721.

v. Queen Empress, L. B. R. (1893-1900) 7. The rule that the statement of one

extent as he implicates the other co-accused and who tries to throw the entire blame on the other co-accused is of very little value at least as against the other co-accused. *Kunja Subudhi v. Emperor*, A I R 1929 Pat 275=8 Pat 289, *Topandas v. Emperor*, 25 Cr L J 761=81 Ind Cas 249=A I R 1925 Sind. 116 It is not the law that unless a confessing prisoner implicates himself as fully as his co-accused the statement will not be admissible, the

is the accused. *Suka Raut v. Emperor*, 4 Pat L T 505 A confession in order to be admissible under this section, must implicate the confessing prisoner

Bag Shah v. Crown, 3 P. R 1879 Cr.

E. I. A.—62.

S. 30. to him, it cannot be rejected against the co-accused. *Lakhan v. Emperor*, A. I. R. 1921 A. 511. A statement by an accused that he and his co-accused met

against the person making the statement, but it may be unsafe to use it against a co-accused *Jasola v. Emperor*, 53 Ind. Cas. 691. It is not safe to base the conviction of persons based solely on a retracted confession of a co-accused which does not implicate the confessor to the same extent as the co-prisoner. *Upendra v. Emperor* (1918) Pat. 175-46 Ind. Cas. 812. Statements made by one set of prisoners, criminating another set of prisoners when each individual prisoner made ought not to be the basis of the conviction of the prisoner tried upon it. *Queen v. Khan*, before a Magistrate, this section does not apply to the confession of the prisoner. L. R. 261-2 Bom. Cr. C. 192-15 Cr. L. J. 433.

Made "The word 'proved' in s. 30 must refer to a confession made before the hand" *Per Gajapati*. *Imperatrix v. Tait*, section 30 is no word 'made' and confession made at trial for the same as the other accused. The duty of the court is to find the guilt of the accused in existence at the time when the charge is made, and the expression 'a confession' is to my mind, inapplicable to the procedure where the Judge asks questions and an accused person gives explanations under a special provision for that purpose. *Mahadeo Prasad v. Emperor*, 76 Ind. Cas. 1025, 1026 Cr. L. J. 305-21 A. L. J. 179-(1923) A. I. R. All. 323-45 A. 323, see also 44.

under section 24 of the Evidence Act cannot be taken into consideration against a co-accused as well. *Emperor v. Umda*, 166 P. L. R. 1911-10 Ind. Cas. 111 P. H. 1911 Cr. = 22 P. W. R. 1911 Cr. = 12 Cr. L. J. 267, *Sri Ram v. Emperor*, 3 A. L. J. 100-2 Cr. L. J. 59.

accused *May Kumar v. Emperor*, A. I. R. 1928 Pat. 473-9 P. L. Ind. Cas. 721.

Chunder Bhattacharyee, 24 W. R. 42. The expression "proving a confession" is applicable to the question and answer under a 361 Cr Pro Code. *Mihadeo Prasad v Emperor*, 15 A. 323-24 A. L. J. 179-A. I. R. 1923 All 322. When a confession is taken in the absence of other prisoners and the latter have no opportunity of denying or even of knowing what their fellow prisoner has said, and when it has not even been read over to them afterwards, it cannot be proved. *Empress v Chundhanath*, 7 C. 65; 121. After proper proof, such confession can be proved. *Ess v Lakshmin*, 6 B. 121. The word "proved" in this section means proved before the case for the prosecution comes to the Court or proved in some accused's mind from the evidence taken into consideration by the Court and such confession cannot be made the basis of the conviction of the other accused. *Muralumuthu Palayachi, In re*, 51 M. 783-61 M. L. J. 358-1931 Mad 820, *Mihadeo v Emperor*, 15 A. 323 but see *Ganpat v Emperor*, 27 N. L. R. 163-33 Cr. L. J. 1222-A. I. R. 1931 Nag. 160-131 Ind. Cas. 686.

Court. The word "Court" in this section means and includes in a trial by jury, both Judges and Jury. *Empress v Ishutosh Chuckerbutty*, 1 C. 318-3 C. L. R. 70 (F. B.)-1 Shone, L. R. Cr. 79.

Every confession is of that the word "may" consideration if it is so on must be exercised giving it a decision that confession to exclude a confession by an accused altogether from consideration against the co-accused if it is so disposed. *Gobraya v Emperor*, A. I. R. 1930 Nag. 212 (F. B.)-20 N. L. R. 229-125 Ind. Cas. 673.

May take into consideration The words "take into consideration" in

partial or qualified admission of guilt on the part of the accused himself and by a limited physical facts pointing to his connection with the crime imputed to him, they are not precluded by law, any more than by reason, from finding of guilty thus sustained. *Queen Empress v Bayaji*, Rat. Un. Cr. C. 311-Cr. Rg. 64 of 1850. The words "may take into consideration" mean may treat as evidence. The weight to be attached to it is evidence against the accused,

Khanjan v
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J in *Queen v Chunder Bhattacharyee*, 24 W. R. Cr. 42. This section does not say that the confession referred to therein is relevant but only says that the Court

30. may take it into consideration against the co-accused. The Court may take into consideration such confession with or without supplementary to relevant facts which may form the basis of a judgment. As a matter of judicial prudence a confession implicating others must be regarded with suspicion. *Sallu v. P. q. r. A. I. R. 1922 Nag 146-65 Ind. Cas. 561-23 Cr. L. J. 129*. The confession of a co-accused can be taken into consideration, but the Court requires corroboration before acting upon such a confession. *King Emperor v. Barker & Co. 21 C. L. J. 192=19 C. W. N. 34=42 C. 759=23 Ind. Cas. 657=16 Cr. L. J. 321, 1917 Crown, 19 P. W. R. 1916 Cr. L. J. 158=33 Ind. Cas. 136, Glavin v. P. 1917 Crown, 31 Ind. Cas. 332; see also *Daulat v. Emperor, A. I. R. 1933 Nag 190* 1933 Cr. L. J. 771.*

rated as evidence of a defective character, and that they require special scrutiny before they can be safely relied on. *Queen v. Sathu Taulah, 21 W. R. Cr. 69*. Confessions are not evidence within the

definition

Empress

S. 384, *Queen v. Ahluwale, 21*

Weir 3rd Ed. 491 *Queen*

C. R. App. 15, *R. v. Dymaram, 37 A. 217*

In *Queen Empress v. Naga, 23 W. R. 21 Cr. Phear J. said* "We find the Legislature avoids saying that confessions of this sort are evidence and may be used as evidence. It says merely the Court may take into consideration such confession." *Jac' son J. in Queen v. Chunder Bhat Acharye, 21 W. R. 47 and Marlby and Morris JJ. in Queen v. Narain Tel, 27th May 1875 (mentioned and overruled in 4 C. 185)* also took the same view. But in *Empress v. Ahluwale Chunderbhatt, 1 C. 453* the Full Bench said that the Legislature has not any intention of calling the confession of an accused person evidence against a co-prisoner. It has no intention of making the confession of the accused evidence against the co-prisoner. So according to the F.

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Rathagan v. P. 1917 Crown, 31 Ind. Cas. 332

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J. in ibid. The confession of a

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1917, 42 C. 789

and if uncorrobo

Anur Hossein, 2 C. W. N. 749 A confession under section 20,

taken into consideration but cannot be treated as substantial evidence. *The words*

matter of Ram Mulla, 1 I. G. 77 *Queen v. Naga, 23 W. R. Cr. 21* The words

'taken into consideration' in the

accused are not to have the

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connection with the crime imputed to him, they are not precluded by law any more than by reason from finding of guilty thus sustained *R v Kanyan Kom* S. 30.
Indu, 11 Ind Jur N S 331; see also *Empress v Suntra*, A W N 1881, 33

sions which affected the accused by connecting or tending to connect him with the crime *Scott C J* remarked (pp 469, 470).—'If the confession (of a co-accused) is corroborated by other evidence it matters not whether, in proving the case at the trial, the confession precedes the other evidence, or the

of each case.' On this point *Scott C J* differed from a doctrine of *Macleod J* in *Emperor v Gangajpa Kardeja*, 38 B 156=21 Ind Cas 673=15 Bom L R

evidence Both decisions agree that the confession of co-accused could not
In Emperor v
 is nothing in s 30,
 after taking the
 Courts of India
 had laid down a rule of practice which had all the reverence of law that a

a as leading
 based on the
attacharya v
 A I R 1927
 If evidence of

degree of proof referred to in section 8 of the Evidence Act has been received or not *King Emperor v Nga Lo Tha* U R II 1913, 2nd Qr 170=21 Ind Cas 166=14 Cr L J 566, *The Nayan v Queen Empress*, L B R (1893 1900) 368 No higher value can be put upon such a confession than upon the statement of an accomplice *Emperor v Abani*, 8 Ind Cas 770=15 C W N 25=11 Cr L J. 710=38 C 169

S. 30. although such evidence is admissible in evidence under section 30 no confession can be given to it unless it is corroborated *Queen v Jaffar Ali*, 19 W R Cr 57 *Queen v Kunjo*, 20 W R Cr 1, *Queen v Salhu Mantal*, 21 W R Cr 69 *Queen v Naja*, 23 W R 21, *Queen Empress v Dosa Jiva*, 10 B 231 So, such a confession must be rejected upon *Queen v Imperatrix v Gaspar* 11 Ind Jur N S 20, *Weir 3rd Ed* 499 *Queen v Bayoo Choukhury* 25 W R 63; *Queen Empress v Khanlu*, 15 B Cr Empress v Bhaurani 1 A 661; *Empress v Panichan* 1 A 675, *Keher v Emperor*, 59 Ind Cas 913, *In re Lalayam*, 81 Ind Cas 817, *Reg v Indigera* 1 M 163=2 Weir 740, *In re Kuppam*, 9 Cr L J 30=5 M L T 300 *Ugappa v Emperor*, 2 C W N 711, *Rajshubir v Emperor*, 11 O C 38 *In re Ramaswami Boyan* 54 Ind Cas 479, *Queen v Malaya* 11 B H C R 19, *Queen Empress v Jadal Dis* 27 C 295=1 C W N 129, *Lalul Mohan v Emperor* 10 C W N XVI, *Mulanya Behari v Empress* 5 C W N 913 *Emperor v Gangappa*, 39 B 156 *Aja Po Kanh v Emperor*, 95 Ind Cas 71 *Cr L J 718=1 I R 1926 Ruz*, 127, *Aja Po Kija v Emperor* 12 Cr L J 465=11 Ind Cas 1001, *Queen v Dwarbaroo*, 13 W R Cr 14, *Kanah v Emperor*, A I R 1932 I R 73 Confession is not sufficient evidence of corrected guilt *Manna Lal v Emperor*, A I R 1925 Outh 1 The confession of a co-prisoner can not per se sustain conviction and in order to achieve that object it must be corroborated also by independent evidence in some material circumstance *Aher Singh v Emperor*, 59 Ind Cas 913=22 Cr L J 161 It must be corroborated by independent testimony and in material particulars *Ramaswami Boyan In re*, 11 L W 8=54 Ind Cas 469=1 Cr L J 79, see also *Emperor v Ammulun* 57 Ind Cas 462=21 Cr L J 678 *Emperor v Sabit Khan* 51 Ind Cas 537=43 B 739=21 Bom L R 449 20 Cr L J 479 But there is no rule as to what constitutes sufficient independent corroboration in a particular case That must depend upon the circumstances the case must consist of when those confessions are retracted at the trial is very low, as pointed out in *Lasin v King Emperor*, 28 C 689=5 C W N 670 and in *Lalit Mohan* case (*Emperor v Lalul Mohan*, 10 Ind Cas 1593=38 C 509=10 C W N 95 *Per Heaton J* in *Emperor v Sabit Khan supra Ugappa v Emperor* 30 L W 403=1929 M W N 272=A I R 1929 Mad 491 "Very possible there may be material to the case")

21 W R 69 *Reg v Balhu* 1 B 475, *R v Kahappa Weir 3rd Ed* 494 *Reg v Dosa*, 10 B 231, *Queen Empress v Rama Sara*, 8 A 306, *Pam M J*, *Emperor*, 89 Ind Cas 899=26 Cr L J 185 The rule as I understand it

of eye witnesses or of admissions by the co-accused. The difficulty arises in cases where the circumstantial evidence against him consists of circum-

stantial evidence—it was sufficient corroboration. A similar view seems to have been

expressed in *Mad L J Article 97*. But in *Empress v Ashulosh Chakravarti*, 1 C 183-186 F D 270.

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ull, *In re*, 20 L W 203-25 Cr L J 1041-81. The self inculpatory confession of an accused upon which alone the conviction of his
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by the confession of another accused as against the accused person who has not confessed at all; but the confession of one co-accused may furnish the corroboration of the confession of another co-accused as against the latter and vice versa *Gangaram v Crown*, 60 Ind Crs 786-22 Cr L J 290, *Emperor v Gangapa*, 15 Bom L R 975-2 Bom Cr C 143-21 Ind Crs 673-14 Cr L J 625-28 B 156 *Emperor v Budhu*, A W N 1881 18. The conviction based on the confession of a co-accused not corroborated in material particulars by independent evidence is illegal *Amir Shah v Empress*, 20 P. R 1880, *Empress v Pura*, A W N. 1885, 320, *Empress v. Bhauani*, 1 A 664; *In re Kappan*, 5 M. L. T 300-9 Cr L J 308-7 Ind Crs. 547.

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in *Kishen v King*-

S. 30.

There is
uncorroborated
evidence against him
caution and care
on its truth or falsity

in *Aga Khan v Emperor*, 11 Cr L J 179=19 Ind Cas 179=6 Bur L 147

Value of retracted confession

is sufficient evidence for conviction

it to be true As regards the person

any corroborative evidence from

127 Ind Cas 871=A I R 1930

Ind Cas 155

Retracted confession and co accused. And retracted confession is admissible but should have no weight attached to it unless either corroborated in material particulars or unless the tribunal comes to the conclusion that the statement as a whole is a truthful statement. In either of these cases the retracted statement is

co accused *Sharma*

The Evidence Act

retracted confession

declaration against the accused though it may be that less weight would be

to a retracted confession *Gour Chandra v Emperor*, A I R 1930 C 11

Mahomed v Emperor 81 Ind Cas 62 A retracted confession is evidence and

there is no provision in this section by which a confession is to be received in

any or another The use to be made by a Court of a confession whether

retracted or not is a matter of procedure rather than law, the business of the

Court being to make up its mind in accordance with the dictates of common sense

whether it is safe to believe the confession or not. *M. Amma v Emperor* 100

Ind Cas 641=A I R 1931 Lah 196

But a mere retracted confession of a co accused cannot be sufficient to

sustain the conviction of another accused *Pala Singh v Emperor*, A I R 1930

Lah 329=29 Cr L J 267=107 Ind Cas 614 Because 'experience and

common sense show that in the absence of corroboration in material particulars

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v Emperor, 8 Pat L T 566=101 Ind Cas 881=28 Cr L J 497=A I R 19

Pat 257 A retracted confession is not the

meaning of section 133 of the Ev

40 C L J 551=A I R 1925 Cal 406

law with regard to a retracted confession

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v Emperor, 2 Pat L T 776=60 Ind Cas 56=22 Cr L J 200

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it is

Where a confession made by an accused person is subsequently retracted by him and he does not implicate himself one of the conspirators, *held* the confession

S. 30

v. Emperor, 62 Ind Cas 515=22 Cr L J 529, *Emperor v. Narain*, A. I. R. 1931 Oudh 53=131 Ind Cas 72. Where the confession of a co-accused retracted before the trial, was not corroborated in a material particular, the connection of the other accused with the cause of the death, that other accused must be acquitted. *In re Manicha Padayachi*, 11 L W 171.

The retracted confession of accomplices may be taken into consideration under s. 30, where there is evidence tending to conviction, but they cannot form the basis of a conviction when there is no evidence whatever. *Reg v. Timaya*, Rat. Un Cr C 104, *Queen Empress v. Sahadu*, Rat. Un Cr C 771, *Altaf v. Crown*, 5 P. R. 1911 (F=11 P. L. R. 1911=27 P. W. R. 1911, *Emperor v. Kheshri*, 29 A. 931. So the retracted confession alone of an accused is not sufficient to justify a conviction of a co-accused but where such confession

reasons
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evidence is admissible and is a strong piece of evidence against the co-accused. *Waid v. Emperor*, 32 Cr L J 12=A. I. R. 1930 Oudh 412, see also *Sheo Balan v. Emperor*, 111 Ind Cas 771=A. I. R. 1929 Oudh 162, *Aryan Singh v. Emperor*, 30 P. L. R. 616=119 Ind Cas 325, *Rahmat v. Emperor*, 11 Lah. L. J. 5=113 Ind Cas 65, *Sardara v. Emperor*, 125 Ind Cas 638. Confessional statements of accused cannot be used in corroboration of the evidence of the approver in as much as tainted evidence is not made better by being corroborated by other tainted evidence. *Daulat v. Emperor*, A. I. R. 1930 Nag 97=31 Cr L J 153.

Against such other persons as well as against the person making the confession. A confession by one of several prisoners which is irrelevant or

latter *Imperatrix v. Istambar*, 2 admissible under ss. 24-26, against (provided it otherwise satisfies its

Four Article 103 In the case of a maker under s. 27, it is admissible, only when the admissible part is a facts himself and other persons. If the

as against the co-prisoner, on the ground that the whole confession was unduly

corroborated and the mere discovery of conviction of A, in the first case also from evidence to show that properly put there by him) corroborate A theft. *Ibid*

Confession of of an accused person considered as the s to in section 133 of the

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30. be examined as a witness. This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an

the wordings of the latter section that it contemplates that the accomplice be examined as a witness not illegal merely accomplice, has no effect into consideration as against a co-accused jointly tried with accused under s 30. All the Chartered High Courts of India have held that a co-accused person cannot be convicted solely on such a confession made by an accused. *Empress v Karimbuz*, 11 C P L R 37 Cr, *Empress v Gorrado*, 9 C P L R Cr 35. So it is clear that such a statement cannot alone form the basis of a conviction but that it could only be taken into consideration along with other evidence in the case. *Emperor v Lalit Mohan*, 38 C 559-10 Ind Crs 582-15 C W N, 593; *Queen v Chunder Bhattacharya*, 94 W R Cr 42.

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Gangappa Kandeppa, 21 Ind Crs 673-38 B 156-15 Bom L R, 510-50 W R Cr C 143-14 Cr L J
 'I think it will be a
Reading, L C J in R v
 115 L J 473-25 Cr

ation as lending support to other evidence in the case. But if there is evidence in the case, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by the other confessions whether they have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not. *Agarwal v King-Emperor*, U B R (1917) 1st Cr. Statements of co-accused persons are not entitled to even as much consideration as the testimony of an accomplice. *Queen Empress v Aana Raju* Rnt Un Cr C 463-Cr Reg of 1889, *Queen Empress v Uma*, Rnt Un Cr C 370-Cr Reg of 1889, *Empress v Ganapabhat*, Rnt Un Cr C 456. The practice when there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused is illegal and an abuse of the process of the Court. *Muhammad v The Emperor*, 35 C W N 490, *Queen Empress v Lakshma Raja*, 23 M 491, *Q E v Pirbhu*, 17 A 599, *Q E v Paltua*, 23 A 53, *Emperor v Kheorje*, 19 B 195, *Q E v Subramanya*, 25 M 61, *contra Q E v Patonola*, 23 M 151, *Suldeb v K E*, 13 C W N 552, *Acsho v Emperor*, 13 C L J 742.

Explanation—Under the explanation to section the word 'offence' always includes abettments and attempts. In *Periya suami Alopam*, 51 W 75-53 M L J 471-129 Ind Crs 645.

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wise produce. But this course is not essential. *Muhammad v*
 C W N 490-A I R 1931 C 341

Admissions not conclusive proof, but may estop.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provision hereinafter contained.

S. 3

Admission—meaning of. The word "admission" as used in this and in the previous sections is rather misleading. "The law of Evidence" says *Prof. Wigmore*, "has suffered in its most vital parts, from an ailment almost incur-

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sions may operate as a waiver relieving the opposing party from the need of any evidence and any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admission he may be entitled to (Rule Order XII, rule 6, Civil Procedure Code) So judicial admission

ment of parties which become in themselves the foundation of independent right for other persons, by virtue of some doctrine of substantive law, — in other words from binding estoppels, warranties and representations *Wigmore* § 1057.

at liberty to prove that such admissions were mistaken or untrue, and is not induced by them in disputing their and that transaction *v Ram Sebul, enath v Bundo* 13 M I A 525; 18 W R 485, 21 W R 422, 1 Cas 33 An

estoppels of judicial admissions have no quality of conclusiveness, and on principle cannot have. *Wigmore* § 1059, *Loveridge v. Bolham*, 1 B & P. 49;

§. 30. be examined as a witness. This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, has no application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confessor.

the wordings of the latter section that it contemplates that the accomplice is to be examined as a witness and not illegal merely. An accomplice, has no right to be taken into consideration as against a co-accused jointly tried with the confessor under § 30. All the Chartered High Courts of India have held that an accused person cannot be convicted solely on such a confession made by an accused. *Empress v Karimbur*, 9 C P. L. R. 37 Cr; *Empress v Gorunda*, 9 C P. L. R. Cr 35. So it is clear that such a statement cannot alone form the basis of a conviction but that it could only be taken into consideration along with other evidence in the case. *Emperor v Lalit Mohan*, 23 C

Gangamma Karendra, 21 Ind Cas 673=38 R 156=15 Bom L. R. 460=20

ened by the fact that it is supported by the other confessions, which have been made in such a manner as to show a conspiracy between the persons concerned. *Nyeen v King Emperor*, persons are not entitled to be taken into consideration as against a co-accused in a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused is illegal and an abuse of the process of the Court. *Queen Empress v Nana Raju*, Rat Un Cr C 468=Cr. 19 of 1889, *Queen Empress v Uma*, Rat Un Cr C 370=Cr. Rg. 19 of 1889, *Empress v. Ganapabhat*, Rat Un Cr C 456. The practice when there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused is illegal and an abuse of the process of the Court. *Muhammad v The Emperor*, 35 C W N 490, Q. F. *Empress v Lakshmanappa*, 22 M 491; *Q. E. v Pirbhu*, 17 A 529, P. J. v. *Paltua*, 23 A 53; *Emperor v Kheorje*, 19 B 195, *Q. E. v Paltua*, 19 B 195, *Subramanyam v K. E.*, 25 M 61; *contra Q. E. v Paltua*, 19 B 195, *Patonohu*, 23 M 151; *Suldeb v K. E.*, 13 C W N 552; *Kesho v Emperor*, 13 Cr L. J. 742.

Explanation—Under the explanation to section the word 'offence' always includes abettments and attempts. *In re Periya suami Moopan*, 61 M. L. J. 471=129 Ind Cas 645.

pass a sentence completely on joint trial to give evidence his evidence with a mind being punishment and the desire to obtain immunity to himself at the expense of the prisoner who produces. But this course is not essential. *Muhammad v Emperor*, 35

desire to obtain immunity to himself at the expense of the prisoner who produces. But this course is not essential. *Muhammad v Emperor*, 35 C W. N 490=A. L. R. 1931 Cal 341.

S. 31

Admissions not con-
clusive proof, but may
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31 Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provision hereinafter contained.

Admission—meaning of The word 'admission' as used in this and in the previous sections is rather misleading. "The law of Evidence" says Prof Wigmore, 'has suffered in its most vital parts, from an almost incurable,—that of confusion of nomenclature. The term "admissions" exhibits this misfortune in one of its notable aspects.' Wigmore § 1019. According to that learned author the term "admissions" as mentioned in these sections should be termed "quasi admission". The true admissions, in the fullest sense of the term says Prof totally distinct principle. But a method of

sions may operate as a waiver of any evidence and any party who has made, either for such judgment or order is upon such admission he may be entitled to (Rule Order 11, rule 6, Civil Procedure Code) So judicial admission, is a formal act, done in the course of judicial proceedings, which waives or

ment of parties which become in themselves the foundation of independent right for other persons, by virtue of some doctrine of substantive law, - in other words from binding estoppels, warranties and representations Wigmore § 1037.

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at liberty to prove that such "admissions" were mistaken or untrue, and in not
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in v Ram Sebak,
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estoppels of judicial admissions have no quality of conclusiveness, and on principle cannot have. *Wigmors* § 1059, *Loderidge v Botham*, 1 H & P. 49;

31. *Neuton v Belcher*, 12 Q. B. D. 921, 921, *Neuton v Luldiar*, 12 Q. B. D. 921
Such an admission does

where it has been acted upon by the party to whom it is made *Jinan Chou Ihury v Doolar*, 18 W. R. 347, *1 roje idra v Chairman Dacca Municipality* 20 W. R. 233, *Ja tant v Paltu* 14 B. 312, *Chandra kant v Pearce Mohan*, 5 W. R. 209. Admissions resemble pre-emptive admissions in that the party against whom they are made may explain the facts of the case and show that the party who is estopped cannot bring forward any evidence to contradict his former conduct—in other words, an estoppel is a conclusive admission. *Cf R. v Pyllem* (1896) 2 Q. B. at p. 270, *Poult on Evidence* p. 477. *Dharm v Gurnar*, 10 B. H. C. 311.

Scope of the section. Admissions by a party to the record out of Court are evidence and primary evidence, of the facts so admitted. *Roscoe N. P. Fr* 61. The value of the admission lies in the circumstances under which it was made, and further to be considered. *Ev* 61.

Within sections 115 to 117 of the Evidence Act, they are not conclusive, but are open to rebuttal or explanation. And this applies equally to admissions made in the presence of the party, and to admissions made in the absence of the party.

held binding. The party may confess its untruth, he may show that the response which formed the admission was made not in a serious but in a joking manner or that the admission was made in ignorance of the true facts.

Rep 220, *Thornes v White* 1 Fyfe & G. 110. Express admissions of a party to the suit or admissions implied from his conduct are evidence and strong evidence against him, but he is at liberty to prove that such admissions were mistaken, that the admission was made in ignorance of the true facts, or that the admission was made in ignorance of the true facts.

Abdul Karim v Rashuddin 131 Ind. Cas. 903—A. If R. 131. On admissions made at another time, for such other statements are not admissible for that purpose, unless they form part of *res gestae*. *Lee v Hamilton* 3 Ala. 59. *Roberts v Thawel* 22 Ala. 490. *Burn Jones* § 296. Informal admissions may be either in writing or oral or even by conduct. They may have been made in business correspondence or casual conversation long before any litigation began or was even contemplated, and with no intention of making a binding admission. They are therefore more easily explained away than formal admissions, but if sufficiently clear they shift the onus of proof. *Poult on Evidence*, 430.

This section declares that admissions are not conclusive proofs of the facts admitted. An admission is the statement of a fact by a party to the suit, and the witnesses are closely connected with the admission. Admissions may operate as an estoppel of saying that an admission is not

The person to whom the admission was made was mistaken and untrue. When the admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue, there is nothing in the

Evidence Act, and there is no general principle or rule of law, to prevent the Court from deciding the case in accordance with it. *Mumy Muz v Ma Thi Yi*, U. R. R. (1897-1901) Vol. II, 377, see also *Singulim v Johar Jan*, 131 Ind. Cas. 555=53 C. L. J. 222, *Abul Karem v Rishulalun*, 131 Ind. Cas. 563=8 O. W. N. 266=A. I. R. 1931 Outh 216. What a party himself admits to be true may reasonably be presumed to be so. Where the defendant is not a party to the deed, and if there is, therefore no estoppel the party making the admission may give evidence to rebut this presumption, but unless and until this is satisfactorily done, the fact admitted must be taken to be established. The expressions of a party to the fact, or admissions implied from his conduct, are evidence and strong evidence against him, but he is at liberty to prove that such admissions were mistaken.

When a party admits a fact which is material to his case, and that admission, but as to third parties he is not bound. *Jain Chandra v Chaudhary* 9 Bom. L. R. 267=11 C. W. N. 321=4 A. L. J. 102=5 C. L. J. 115=17 M. L. J. 103=2 M. L. F. 109. Those admissions which have not been acted upon, either because they were originally made without any intention of being acted upon, or because for any other reason they, in fact, remain unacted upon, or have not altered the situation of the opposite party are not conclusive, though they are receivable in evidence.

whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement. *Dinabandhu v Minnu Lal*, 52 Ir. L. Cas. 443. An admission by one defendant against another, which admission the Court finds to be conclusive, cannot relieve the plaintiff from the burden of stating his case against the admitting defendant, nor can it shift the burden of proof to the shoulders of the latter from of the plaintiff. *Shankar v Mubhar Hussain* 6 W. R. 299. Where there is no privity of contract between the parties an admission made by one party will not bind another. *Ganesha Das v. Dularani* 1 P. Ind. Cas. 7=12 L. L. J. 137.

Admissions not conclusive proof. Under this section admissions are not conclusive evidence of the matters admitted. *Jaganmuth v Kalilar*, 8 Pat. 776=10 Pat. L. T. 191=A. I. R. 1919 Pat. 245, see also *Sali v Jala*, 131 Ind. Cas. 128=32 P. L. R. 245, *Secretary of State v Fildybatu*, A. I. R. 1929 Lah. 743, *Darindar v Lachmi*, A. I. R. 1930 Lah. 9=5. A party is not bound by his own representation when If treated as admissions that they were not true. Admission is conclusive only, made *Janan Choudhur* where its circumstances. *Ramabul*, 12 W. R.

Where the defendant wants to make a statement in evidence, he is at liberty to show the real nature of the transaction. *Musammal Lotufunnissa v Gour Saran*, 18 W. R. 455=493. An admission not explained, though not conclusive, is strong evidence. *Hunsa Kour v Sheo Gehind*, 24 W. R. 431; *Sankarachariya v Manali*, 51 Ind. Cas. 876; *Ambar Ali v Lutfe Ali*, 21 C. W. N. 996. A deliberate confession though not operating as an estoppel case is upon the making it, the burden of explaining is not averted was not the fact. 5 B. L. R. 329; *Greenath v. 21 W. R. 431; Vir v Harnam*, 184=11 C. W. N. 331 P. C.

THE INDIAN EVIDENCE ACT

S. 32. If the defendant admits any sum to be due, that admission, irrespective of the proof offered by the plaintiff, is sufficient to warrant a decree for that amount in the plaintiff's favour. *Ishan Chunder v Nobodutep* 6 W R 132 See also *Dhur v Sreenath* 18 W R 331. If in a suit for specific performance of an agreement, the defendant admits the terms of the agreement and its execution, the plaintiff need not put the document in evidence nor prove its execution. *Burjuri v Mancherji* 5 B 153, *Mc Gowan v Smith* 26 L J Ch 8, see also *Alexander v Mr Mahomed* 5 B L R 59 (P C) = 11 W R P C 29-13 W I A 438.

The weight to be given to such admissions depends on various circumstances. If the pleading is sworn to and hence it is deliberate and solemn statement of the party, its admissions may afford evidence, and it is not easily rebutted. When the allegations are made on information and belief they are still admissible in evidence, as this fact only detracts from the weight of the testimony. *Doe v Steel*, 3 Camp 115, *Pope v Illie* 1 U S 363.

Admissions made in Court or in appeal, where properly proved in a transcript or case made so long as they remain a part of the record, and the statements or admissions were made by himself or by his counsel and not honest mistake or misapprehension of what the facts really were, and he desires to be relieved from the effect of such admissions, the Court for leave to withdraw such admissions to do so make a showing of good faith should be granted or denied in the discretion of the Court. In that action conclusive evidence is in the pleadings, or expressly makes in the pleadings, or are formally entered into for the purpose of dispensing with proofs. *Bar J* 23 § 274.

Admissions made in another suit, and from their solemn character are entitled to great weight, but they are not conclusive against the party and do not constitute an estoppel. *Doe v Steel*, 3 Camp 115. *Canero v Light foot* 2 W Black 1190, *Sturdy v Sanlers*, 2 Dowd & R 315, *De 117* 12-13 *dale v Milburn* 5 Price 185.

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STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases :—

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty ; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind ; or of a document used in commerce written or signed by him ; or of the date of a letter or other document usually dated, written or signed by him.

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

(5) When statement relates to the existence of any relationship* [by blood, marriage or adoption] between persons as to whose relationship* [by blood, marriage or adoption] the person

* These words in s 32, cls (5) and (6), were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 2

32. Making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised

(6) When the statement relates to the existence of any relationship [by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised

or in document relating to transaction mentioned in section 13 clause (a),

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a).

or is made by several persons and expresses feelings relevant to matter in question

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(a) The question is whether A was murdered by B, or

directly to the murder, the rape and the actionable wrong under consideration, — relevant facts

(b)

An
business,
of a son

Kept in the course of
er and delivered her

(c) The question is, whether A was in Calcutta on a given day

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business is a relevant fact

(d) The question is, whether a ship sailed from Bombay harbour on a given day

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact

(e) The question is, whether rent was paid to A for certain land

A letter from A's deceased agent to A saying that he had received the rent on

and

on a certain day The fact that a letter written by him is dated on such day is relevant.

* These words in s 32, cls (5) and (6), were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 2

(h) The question is, what was the cause of the wreck of a ship
A protest made by the Captain, whose attendance cannot be procured, is a relevant fact

The question is, whether a given road is a public way
statement by A, a deceased headman of the village, that the road was is a relevant fact

(i) The question is, what was the price of grain on a certain day in a particular market A statement of the price, made by a deceased banyan in the course of his business, is a relevant fact

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date is a relevant fact

(n) A sues B for a libel expressed in a printed caricature exposed in a shop window The question is as to the similarity of the caricature and its libellous character The remarks of a crowd of spectators on these points may be proved

as witnesses Sections 32 and 33 which exclude hearsay The desirability of getting the person, or the person, that he may be examined

is a witness in the regular way But this is practically impossible in many cases *Markby Ev* 32 So the first principle on which these statements are admissible is

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such evidence is receivable, are consonant with reason and general convenience

Nort Ev 174

Nature of Hearsay as an Extra Judicial Testimonial Assertion

utterance in his hearing
qualified to testify, so that

testimony to it In other words,

times, had a way seems always to have been followed, used to know what the statement was.

the aspect of family reputation, and reputation was often reckoned an adequate ground for judicial action. In the thirteenth century we find a witness, in proving another person's age, giving as the basis of his testimony the fact of the mother's recording the age in the records of a P'elary, which record he had seen. In matters affecting a whole parish or a large number of persons, the hearsay and reputation of those belonging in the given community was always regarded as good.

"There was another class of unwritten statements which had always been resorted to in judicial proceedings and admitted to the jury, namely, written ones, entries in registers, in a person's books, in the account books of the stewards, in a merchant's books, in contracts, deeds, wills, and other documents. Documents had always been shown to juries,—long before witnesses were required to testify to them. In the early days they did not stick, it would seem, at showing the jury any document that bore on the case, without even thinking of how the writer knew what he said.

It appears, then, that the prohibition came in under a

or rather, so to speak, stayed in, simply because they had always been received, and no rule against hearsay had ever been formulated or interpreted as applying to them. Much things, continuing at the present day, are e. g., the admission of old entries and writings in proof of ancient matters, written declarations of deceased persons against interest, and in the course of duty or business; and, to

of 1800, qualifiedly in ver

in their turn, these deceased persons of law the made; or ed, such same fact

use of testimony, and declarations of present intention or present physical sense

whether and how far

in a hearing question of

"I have my judgment upon this that no document could be received, and within the general rule that hearsay evidence is not admissible" (*Clark v. Freeman*, 16 App. Cas. 623). On the other hand, *Sir George Jessel*, in a very different time, in 1876, had declared it to be the Court's duty to extend the exceptions to the hearsay rule, out of regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases" (*Stephen v. R. Leonard*, 1 Prob. Div. 154). It seems a sound general principle to say that in all cases a main rule is to have extension, rather than exceptions to the rule; that exceptions should be applied only within strict bounds, and that the main rule should apply in cases not clearly within the exception. But then comes the question, what is the rule, and what the exceptions? There lies a difficulty. A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatever

S. 32 been asserted on the extra judicial occasion in question by the extra judicially stating or narrating witness" Book VI, Ch IV of *Bentham's Principles of Judicial Evidence* The Hearsay rule tells us that B's assertion cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate a real value by exposing such latent sources of error *Wigmore* § 1361

Form of Hearsay In respect to form, hearsay statements may properly be regarded in one of two ways The rule of exclusion applies indifferently to them all As distinguished from each other by the nature of their source unsworn statements in their assertive capacity may be treated as composite or individual

Composite hearsay may be defined as a compound or blended extrajudicial declaration of an indeterminate number of people so mingled that the separate voices can no longer be distinguished

Individual hearsay, on the contrary, may be regarded as an extrajudicial statement shown to have been made by a particular person or set of persons as far as classified by means of the which through which the utterance is presented to the tribunal they may be conveniently considered as being oral printed or written *Chamberlayne's Ev* § 2737

itself

Tradition

tute reputation *Chamberlayne's Ev* § 2738

Hearsay Rule and its exceptions—its Historical development etc There is a great head of the law of Evidence" says *Prof James Bradley Thayer* "comprising indeed, with its exceptions much the largest part of all that truly belongs there forbidding the introduction of hearsay The true historical nature of the rule is hinted by the remark of an English Court, two centuries ago and over when they checked the attempt of a woman to testify what another woman had told her The proper for *Wells* if opinion that it will be the *Canning's Case* 10 How St Tr 38 went to the medium of ordinary testimony but communication, by that time be it must be a statement of a person who could veyant, a hearer and seer, as they said in the older Year Books, one who could say as the witnesses to Courts in older times always had to say quod videt audire, it must not be themselves originally with testimony of other witness of what they were say

state it if they did, were not to say inferred from what between the function of a criminal and a fact

now call circumstantial

doctrine, rules which were coeval with the doctrine itself or much example, it seems always to have been true, in cases of homicide, that the declarations of persons killed were reported and acted on in judicial proceedings. We find these used by a complaint witness as far back as 1202, and used in evidence to the jury in 1721 Such declarations in early times, and even in law

times, had a peculiar credit allowed them
 say seems always to have been resorted to
 loped, as
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ground for judicial action In the thirteenth century we find a witness, in
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 to them Such things, continuing at the present day are e g, the admission
 of old entries and writings in proof of ancient matters, written declarations of

persons against interest were received, and, in England even oral declarations of
 deceased persons in the course of duty or business And not only has the
 scope of these old titles been enlarged, but now exceptions have been made; or
 perhaps they are rather old ones coming to be recognized and formulated; such

whether and how far
 as being mere exceptions:

should apply in cases in
 question, what is the rule,
 true analysis would pro-
 hearsay rule the exception,

S. 32. is relevant in adm exceptions, but this classification rule would have that it shows a sp particular instances, while rejecting it generally. For example there is, son &

to say the contrary or as part of a series of statements or a class of them which are usually careful and accurate and the like; credit amply enough in point of reason to entitle them to be received as evidence, when once the absence of the

fact itself *pari passu* lying under the course of hearsay, but recovered, by way of exception, on account of this special intimacy of connection with the admissible fact. This part of the subject presents an instructive spectacle of confusion resulting from the desire on the one hand to hold to the just historical theory of our cases and on the other to be aware of the size and complexity of the problem. *Thayer's Prel Treat*

Theory of Hearsay Rule The principle of exclusion of hearsay evidence Credit being derived from attestation fountain from whence it flows and when there was such a speech made for rat rely

to be affected by it, had no opportunity of cross examining him' *Idem* *Wignior* § 1362 "It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner not only because it is not upon oath but also because the other side, hath no opportunity of a cross-examination" *Haulin's Pleas of the Crown* C. II C. 46 § 11 In also the objection of *Peckham* in *Wright v Tatham*, 7 A. & E. 313, Co an oath furnishes some guarantee for value of it' In the same case *Alderson* B said "The general rule is that facts are to be proved by testimony of persons on oath and subjected to cross examination. In *Grasham Hotel v Manning* Ir R 1 C J 125, O'Brien J said "The statements and declarations of opinion received in evidence in this case were made by parties not examined upon oath or subject to cross examination and would not be exempted from the general rule excluding hearsay evidence"

In some of the cases great stress is put on the right of cross examination In *Dyball Peerage Case*, L R 11 App Cas 503, Lord Blackburn observed

the evidence of a man who is not pro-
not be cross examined, as a general rule
Key v. Part of Inglesea, 17 How St Tr
... So "the general rule is that
that such statements are

the author of the statements not being exposed to cross examination in the presence of a Court of justice, and not speaking under the penal sanction of an oath, with no opportunity to investigate his character and motives, and his deportment not subject to observations" *Marshall v. R. Co.*, 48 Ill 476, see also *Berkeley Petrage Case*, 4 Camp 406; *Doe v. Judgady*, 4 B & All 51; *R. v. Darlin*, Jobb Cr C 127; *Smith v. Blake*, L. R 2 Q B 326, *R. v. Jenkins*, L. R. 1 C C. R 193; *Suglen v. St. Leonards*, L. R. 1 P D 154.

'Of the two main facts' says *Mr Chamberlayne* which impair the probative force of an unsworn statement used as hearsay, lack of oath and the absence of cross-examination probably the latter is, at the present time regarded as being by far the more serious. Indeed, the importance of the oath is more frequently regarded as an incident of cross examination, than as a valuable guarantee for truth in itself considered. While, therefore, lack of sanction of an oath is spoken of by judges as being an infirmative consideration in relation to hearsay of practically co-ordinate importance with absence of cross-examination, such can scarcely be regarded as the fact. The real reason for thus joining the two requirements of oath and cross examination is that cross-examination, in a juridical sense, takes place under oath. An extra judicial statement given under oath, is as objectionable to the present rule, if not tested by cross examination, as an unsworn statement would be" *Chamberlayne's Ev* § 2712.

Reason for Hearsay Rule—Inherent weakness—Absence of cross examination. The absence of a cross-examination is a more serious matter. Not without

withstood the probing of a well conducted cross examination. A proponent whose witness in stating the truth can ask for no better help for the establishment of

regarded
break a p
is composed is sound or rotten. In much the same way, in the absence of the searching test which cross-examination alone makes practically possible, the tribunal has, as a rule, no satisfactory data upon which to estimate the probative
h circumstances judicial adminis-
being misled. A presiding Judge
ring that such a statement was irre-

levant, without probative force, or that the jury could not reasonably act upon it.

On the other hand, the use of a rigid rule of procedure to the effect that however necessary the extra judicial statement may be to the proponent in prov-

S. 32. that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of

for the evidence—may be examined more closely, taking first the latter

(1) Where the test of cross examination is impossible of application by reason of the declarant's death or some other cause rendering him now unavailable as witness statements &c
The question the latter or the policy of the

test of cross-examination

(2) There are many situations in which it can be easily seen that such required test would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a deep ordinary instance) in on a test whose chief object exists, the statement comes from that person was

the Hearay etc.

Jessel M R in Sugd's
of some other country
persons who are dead in
circumstances in which such evidence
ought properly to have been admitted, that is, where the person who made them
had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, on this subject, so frequently
entirely could it have been

all cases where they were made under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, on this subject, so frequently entirely could it have been
a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule. Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested, that is, disinterested in the sense that the declaration was not made in favour of his interests. And, thirdly, the declaration must be made before a dispute or litigation, so that it is made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting the declaration must have had peculiar means of knowledge not possessed in ordinary cases." *Chamberlaynes Ex* § 2763 notes

he is dead

a greater or less necessity for more than (1) The person whose statement is offered may now be dead
unavailable for the
palpable reason. It
seven ensuing ones
out in the rules, but the general notion is clear and unmisleading

acknowledged in these exceptions with more or less directness and strictness
 but we cannot expect, again or at this time, to
 the same or other sources. This appears

 of less duty in the exception
 section 6), for reputation, and is
 (as in the first case) with the entire
 some valuable source of evidence

. convenience, can be predicated. But the
 1121, *Chamberlayne's Ev* § 2761. Hearsay
 here is better evidence. There are certain
 their very nature, admit of the production
 relationship, character, custom, prescription and
 R. Act X Rule. 30.

Second :
 second principle
 untested, is
 cross-examination
 accuracy and
 equivalent to
 ability of
 not quite
 the cir-

stances presuppose. It is merely that common sense and experience have from
 time to time pointed them out as practically adequate substitutes for the ordinary
 test, at least, in view of the necessity of the situation. *Wigmore* § 1422

Witness qualifications, and other Rules, also to be applied to statements
 admitted under these exceptions. The Hearsay rule is merely an additional
 test or safeguard to be applied to testimonial evidence otherwise admissible.

declarations. The English rule in *R v Phipps* 509 according to

ion it is relevant, though, possibly

Scope of Section 32. This section provides an exception to the general

may have spoken hastily, inaccurately or even falsely. Moreover the person who
 is really responsible for the statement did not make it on oath; he was not

S. 32. cross-examined upon it, and the Court has no opportunity of observing the manner in which he made it. It is a fundamental principle of our law that evidence is not admissible unless it is given in the presence of the Court.

are as follows:—Statements written or verbal, of relevant facts when made by a person (a) incapable of being cross-examined, or (b) incapable of being cross-examined to an amount of

to the Court unreasonable, and admissible: (1) when it relates to the cause of his death or (2) when it is made in course of business, or (3) when it is made against the interest of the maker; or (4) when it gives opinion as to public right or custom, or matters of general interest; or (5) when it relates to existence of relationship, or (6) when it is made in will or deed relating to family settlement, or (7) when it is made in document relating to transaction mentioned in section 13, clause (a); or (8) when it is made by several persons and expresses feelings relevant to the matter in question. In the absence of the conditions prescribed by section 32 of the Evidence Act a plaintiff filed in a prior litigation a statement to prove a statement by a superior landlord *Lakshmi v. Tahir*, 39 C L J 90-29 C W N 1033-80 Ind Cis 357. A recital in a document is admissible in evidence against parties who are not parties to the document, only where the conditions laid down in section 32 of the Evidence Act are fulfilled. *Ram Sarup v. Bhajant Prosad* he admitted as corroborative of collection of rent at a certain

the corroboration required by *Charlter Rat v. Rat* is not sufficient. *Isahani 41 Ind Cas 422*

Requisites of admissibility under section 32. Statements oral and written made by persons not parties to the suit, and not witnesses therein, are not admissible.

of the rule itself. The first of these is that of necessity; i.e. the situation in which it is no longer possible to subject the person to oath and cross-examination, so that if his statements are to be had at all, they must be had without applying these securities (i.e. securities guaranteed by oath and cross-examination) for trustworthiness. The law on the subject is thus laid down by Tillyer in *C J in Garwood v. Dennis*, 4 Bing 328. "It is objected that however impressive the declaration of a man of character may be, yet the law admits the word of no man in evidence without oath. The general rule certainly is so, but subject to relaxation in cases of necessity or extreme inconvenience. The second notion is that, even though a necessity exists for relaxing the hearsay rule, nevertheless this is not to be done unless there is in the particular case of declarations offered, some shall—in some degree, at otherwise required. *Green v. Conn* 507, *Loomis J* said oath and the test of cross-examination as a pre-requisite to verbal testimony, unless it covers the nature of the case, is not equivalent for one who are dead or other admitted in the cases in principle of necessity under which statements are admissible of the statements.

It is shown that the sanction by persons who are not parties to the suit is not sufficient. *32 and 33. Strictly speaking hearsay is relaxed by section 32 and 33. The whole*

possible in the 17 "Section 32 persons who The object of those restrictions and the reasons for them are plain. The basic principle of legal evidence being that the Court must always have the best, it follows that where persons can be, they must be brought before the Court to tell what they know at first hand. Their veracity can then be best tested by the art of cross-examination. Where however witnesses cannot be brought before the Court evidence of a kind that a Court in the conditions which when no imposed upon its admission truth. As there is no statement will not be at ordinary course, a true statement."

Per Beaman J in ibid

Written or verbal. The rule as regarding hearsay is so sweeping that it excludes all written hearsay irrespective of the mode in which it is presented—very often in the form of official records, but more frequently according to the particular commercial transaction to which it relates. Of course the fact that the written hearsay is in the form of letters or telegrams does not avail to make it admissible. The fact that hearsay is printed no matter in what form, does not alter the application of the rule. *Burr Jones* § 298. So considered as hearsay, an unsworn consideration of the writ. Temporary, against hearsay § 2756. As it is but proof of the exceptions to that rule.

"Verbal" means by words, it is not necessary that the words should be spoken. If the term used in the section were 'orally', it might be that the statement must be 'confined to words spoken by the mouth'. But the meaning of the word 'verbal' is something wider. The words of another person may be so adopted by a witness as to be properly treated as the words of the witness himself. *Per Petheram C J in Queen Empress v Abdulla* 7 A 385 (397) F B. In the same case *Straight J* said: "I am also of opinion that the signs made by the deceased *Dulari* in response to the question put to her, may be given in evidence from which the inference may be drawn or negatived the matter of such questions. It is established satisfactorily to the Court that such questions taken with her assent or without constitute a verbal statement as to the cause of death."

Section 32 of the Evidence Act. I am not relying on a technical distinction as to say that while questions adopted or negatived by a mere 'yes' or 'no' constitute a 'verbal statement' within s. 32, they become inadmissible when assent or dissent is expressed by a nod or a shake of the head. But *Mahmood J* expressed a different view in the same case. At page 398 he said: "I should accept the meaning of the word 'verbal' to me."

'verbal' cannot mean more than 'by means of a word or words'. Nodding the head or waving the hand is not a word. As regards dying declarations *Prof Greenleaf* observes: "The testimony here spoken of may be given as well by signs as by words, thus, where one, being at the point of death and conscious of her situation, but unable to speak, received, was asked the nature of the wounds, and, if squeezed his hand, the sign was received. Consideration of the jury." *Greenleaf Ev* § 159(b). In *Mochabau v Com*, 78 Ky.

- S. 32. 382 *Hines J* said "Dying declarations are not necessarily either spoken or written. Any method of communication between mind and matter adopted that will develop the thought, is the pressure of the hand or a nod of the head or a glance of the eye" See also *R v Lowe*, 10 Br C 1, 39, R 12 Cox Cr C 168

Rejection of evidence by the lower Court When the Court below rejected the evidence of certain witnesses on the ground that it was false and had not conformed with section 32 of the Evidence Act, and on the other hand the evidence it was sometimes uncertain whether the witnesses were from their own personal knowledge or from information derived from others, but the Court had considered it from both points of view and held it admissible. The Judicial Committee saw no reason to differ from the estimate which the lower Court had formed as to the credibility of the witnesses in the former case, nor, in the latter case, to question the manner in which the Court below applied the provisions of section 32. *Shafiq-un-Nissa v Shabon Ali Khan*, 26 A 581-9 C 105-6 Bom L R 750

Relevant facts. This section lays down that the statement, whether written or verbal, in *Queen-Empress v* examination" says employed as hearsay, or, more properly, determinate, evidentiary value to a declaration not so tested, has led to its administration as is most clearly seen in connection with the exception on hearsay rule subjective, evidence a demonstration of overwhelming forensic necessity on the part of the prosecution would warrant incurring some hazard by way of misleading the Chamberlayne's Ex. § 272. Facts which are objectively relevant are relevant and 5 *Blusana* not relevant "If a fact Facts not learned 10, relevant

I cannot see that the other portions of the Examinations is to the declaration undoubtedly the identity of the murderer is a fact in issue in a trial for murder. These would not have been the intention of the Legislature. Facts in issue are facts about which there is a question in issue between the parties and although all relevant facts are not necessarily facts in issue, I cannot understand how the facts that are in issue can be other than relevant to the determination of the suit, and this I think is clear from the language of section 5. But see *Patel v Patel*, 15 E 365

Subjective relevancy If the objective relevancy of a hearsay statement is tacitly assumed to be a matter of course the question of subjective relevancy stands in quite a different position

Adequate Knowledge and Absence of Controlling Motive to Misrepresent, this difficulty is almost entirely confined, in case of hearsay, to other statements, to the latter. Adequate Knowledge like Objective Relevancy, raises in practice, but little difficulty in its determination. It can be finally settled, once for all almost on inspection. But in the case of Absence of Controlling Motive to Misrepresent, the situation is quite different. *Chamberlayne's Ex* § 2731

Subjective Relevancy—Adequate knowledge—A qualification required in case of every witness is that he should be shown or can reasonably be assumed to possess a knowledge commensurate with, sufficient to give evidentiary value to, the evidence which he proposes to offer. Should the matter be one covered by direct observation, it must

facilities and opportunities to

Where the fact to be stated is

appear or be justifiably assumed

knowledge helpful to the jury. Should it appear that the proposed testimony is not based upon adequate personal knowledge gained from observation or otherwise, it is subjectively irrelevant and should be rejected. The fact may be established but cannot be credited. The requirements are no means restricted to the judicial use of unsworn statements. But it is naturally insisted on in such a connection so far as can reasonably be done. *Chamberlayne's Ex* § 2732

Subjective relevancy—Absence of controlling Motive to misrepresent—"The credibility and consequent admissibility of an unsworn statement is thus seen to rest upon its subjective relevancy and this in turn, upon the existence of the motive to misrepresent. The question is a crucial one and of some nicety and difficulty when viewed from the strict point of Procedure. To exhibit to the jury by the aid of cross examination facts out of which may be thought to arise motives tending to pervert, consciously or unconsciously, the desire to truthfully narrate facts known to the declarant is a comparatively easy matter. The provisions of Procedure have been greatly taxed in an attempt to formulate general rules as to what may or may not have been omitted which may to a certain extent supply the place of judicial testing. *Chamberlayne's Ex* § 2733

"Secondary evidence In considering the use of hearsay statements at the present day under enlightened judicial administration by the use of reason it would be natural in case of a hearsay statement to adopt the rule that in order for the declaration to be subjectively relevant it must appear that the declarant was not so far under the influence of bias, self interest or other controlling motive to misrepresent as to render it irrational that the jury should credit his story. *Chamberlayne's Ex* 2733

"In dealing, however, with the exceptions to the hearsay rule where the assertive unsworn statement is treated as secondary evidence, it is important to bear in mind that we are dealing, as it were with the stone age of judicial evolution. The temper of the times during which the hearsay rule and its exceptions were formulated is procedural rather than administrative. Preappointed equivalences, the ability to state one fact in the terms of another like the place to which the judgment deduced by reason from legal principles might more properly lay claim. Thus in relation to subjective relevancy Adequate Knowledge in case of a declaration regarding Pedigree must be shown by membership in the family. Absence of controlling motive to misrepresent is established by the fact that the assertion was made before the warmth of partisanship or the beguiling of self interest had been aroused by a *Lis Motu*. In other words, to secure admissibility on account of subjective relevancy the hearsay statement must have been made *ante litem motam*. *Chamberlayne's Ex* § 2733

Primary Evidence
equivalences characteristic
cases in which modern jury

sufficient guarantee

In course of legal evolution the existence of one of two forces was found to furnish a sufficient guarantee to this effect. These are (1) the Force of Spontaneity and in certain cases (2) the Force of Habit. In either case, experience showed that the

S. 32.

is the probative force of assertive judicial decisions as happened to modern judicial administration that the evidence is not secondary as originally regarded by procedure but is, under modern conditions, primary there being no species of proof of a superior grade in connection with matters to which they relate." *Chamberlayne's Ld* § 2733

Person "This argument was based entirely upon the provisions of the General Clauses Act which says that 'person' shall include 'persons', it was contended that 'person' in section 32 must be read as 'persons'. I do not think that this ingenious argument is entitled to succeed." *Per Maclean C J in Chandra Nath v Nilmudhub* 3 C W N 88(89)=26 C 236 (237) as a statement relating to the existence of a person signed by several persons some only under clause 5 of section 32 of the Evidence Act. If the document is dead, the statement made by it is not admissible under section 32, if it comes under one or other of its clauses, being thus the statement of a person who is dead. *Ind*

... dered to be sufficient to satisfy an, 10 Conn 11, *Williams J* 241

... writing by such a person filed before him was held to be inadmissible in evidence as *Agat Lal v Jogeshwar*, 25 A 149 P C Before *Queen v Govalao* 19 W R 236=3 C W N 83 So as to those who has been fully

adm

Cr

also the case examined and cross examined the suit In such a case

for the admission of the previous statement made by the witness *Kusum Kumari* 46 Ind Cr 929=5 Pat L J 161 Where a person making a dying declaration chances to live, his statement is not admissible *Emperur v Ram Sattu*, 1 Bom L R 434

Who cannot be found is in effect unavailable if disappearance is shown by search The only objection to the possibility of collusion between to be satisfied that there had been bona fide, this objection loses its force find a witness, then he is as it were dead

may be read "so is the party make oath that he did his endeavour to find a witness, but that he could not see him nor hear of him" *Anon Godbold* 3 B In *Oates trial* 10 How St Tr 1237, 1285, *Oates* "My lord, I will try to produce what he swore at another trial; L C J *Jeffereys* "Why, where is he? Is he dead?" *Oates* "My lord, it has cost a great deal of money to search him out; but I cannot anywhere meet with him and that makes my case so much worse that I cannot, when I have done all that man can do to get my witness, when I thought my trial would be of him" L C J, "Look at me, I am ready to admit of any will

indulge you so far

found within the jurisdiction of the court residence or in the country is not sufficient *Thomas v State*, 100 Ind 171 A *Pope v State*, 100 Ind 171 A

making a dying declaration chances to live, his statement cannot be admitted in evidence as dying declaration under s 32 of the Evidence Act, but it may be relied on, under s 157 of the Evidence Act, to corroborate the testimony of the complainant when examined in the case *Emperor v Rama Sattu, 1 Bom L R 191*

Incapable to give evidence. In a murder case one of the witnesses for the

fully discussed

evidence
referred is
Sama-
observing
during
the his
section
of
been

for the sake
by plain
accounts to
an account
written state-

ments of relevant facts made by persons whose attendance could not be procured without unreasonable delay and expense, such statements having been made in the ordinary course and written or signed

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is not a ground for ad

previous statement made by him on the ground that his evidence cannot be procured without unreasonable delay or expense *Kadappa v Tirupathi, 80 Ind Crs 576-21 L W 210-A I N 1925 Mad 111* Vide also under section 33

CLAUSE I.

Dying declarations—Principle of Admission The grounds of admission of dying declarations are (1) death, (2) necessity, for the victim being generally the only eye witness to such crimes, and (3) the sense of impending death, which creates a sanction equal to the obligations of death *R v Woodcock, 1 Leach 500 (504); R v Perry, (1909) 2 K B 697, Phip Ld 308*

The injured person being dead, any proof, the testimony of these witnesses the charge could scarcely be

made out except by the facts of the transactions of the real facts The

received unless there is to be a failure or miscarriage of justice While these

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is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice. *Per Erle C B. in R v Woodcock*, 1 Leach 500 501 "Taking men as they are at present the will of the guarantee for truth telling in case so high as early administration was a monument in favour of the establishment of the exception that a sense of impending death created a sanction equal to that of the administration of an oath may be conceded. Is it quite certain however that the sanction of the oath remains the same at the present time as in early days? (Christies in a religious belief in a growing disbelief in the once universal accepted doctrine of eternal life) themelves registered in Let, regardless of the fact punishment is still insisted on no period of its utility have the ultimate Perjury has always been a curse of judicial administration. If the law is to be a deterrent rather than a trial Even so the present state of the law therefore

that it is the species of oath under which a man is by truth telling in judicial service. *— Chalmers v R. § 2319*

Dying declarations when admissible under English Law A declaration made by a declarant as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is deemed, to be relevant only in trials for murder. A declaration is shown to the jury of death and to have given a reason was made. *Steph Dig Ev. tri 26* So declarations are made upon charges other than homicide or as to homicides other than that of the declarant. The deceased must be proved to the satisfaction of the Judge to be in actual danger of death at the time of the declaration. *R v Pray, (1909) 2 K. R. 10* So the application of the law is strictly and absolutely limited to cases in which the death of the declarant is the subject of enquiry, or is part of the transaction. *R v Wood v B & C 605* So dying declaration is not admissible on an indictment of perjury. *Ibid* So when on an indictment for administering poison to a woman pregnant but not quick with child the intent to procure (the woman being the declaration made) were made in an enquiry of enquiry L J M has been are also 337 In in evidence, and his maid servant who was present and had made the cake, and not afraid of it, and thereupon ate of it, and was in consequence poisoned and died. Her dying declarations (made after she knew of her master's death and was conscious of her own approaching death) as to the manner in which she made the cake, and that she put nothing but in it and that the present eating his breakfast at one end of the table while she was making the cake at the other end of it, were tendered in evidence, and objected to on the ground that the only person whose dying declarations could be received in evidence was the person whose death formed the subject of enquiry. But *Coleman J* after consulting *Parke B* admitted the evidence on the ground

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ed equal to an oath, but they are nevertheless open to observation. For though

the evidence of such declarant inadmissible? If the above conditions concur, it is immaterial under the English law that the declarant lingered for several days, or even weeks (*R v Burnadotti*, 11 Cox 316, *R v Craten* 1 Law 77) or

of the name of *Edwards*, very much
been recently executed for a high way

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evidence

this subject had proceeded from the solemn declaration of a dying man, it was admissible evidence in favour of the prisoner. The Court observed "It would be inconsistent with the rules of evidence which are rules of justice, to examine a witness to the declaration of a person dying under the circumstances described

received is, that the mind

acts under a sanction

ed by a solemn appeal to

und convict, would be

carrying the rule of evidence beyond its possible extent, even if the person were alive, for as an attainted convict, he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive. The fact, however, that a man resembling the person of a prisoner was executed, may be g
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danger existed

The deceased clearly thought he was dying, and had no hope of recovery.

S. 32. There is no ground for holding his declaration inadmissible. In a trial for murder a written declaration of the deceased made under the following circumstances was tendered in evidence for the prosecution; the declaration had been made on oath to a Magistrate's clerk about thirteen hours before death, the clerk asked the deceased before he took down her statement whether she was likely to die; she said "I think so from shortness of my breath," her breath was then extremely short, the clerk said, "Is it with the fear of death before you that you make these statements? Have you any present hope of your recovery?" She said, "None." The clerk then wrote out her statement and added to it the above conversation in the form of a statement by the deceased, but he omitted the word "present before" "hope." He then read over it to the deceased what he had written, and she then added the words "at present." After "hope" and signed the declaration. It was held that the statement was not admissible in evidence, as it did not appear to have been made under a settled hopeless expectation of death, inasmuch as the deceased had expressed a qualified hope by inserting after them the words "at present." *R v Jenkins* (1869) L R 1 C C R 187. *Kelly v B* in his judgment said: "The result of the decisions is that there must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die. If we can look at reported cases and at the language of learned Judges we find that one has used the expression 'every hope of this world gone' (*Per Eyre C R* in *v Woodcock*, 1 Lea C C at p 502), another 'settled hopeless expectation of death' (*Per Willes J* in *R v Pidd*, 2 F & F at p 22), another 'any hope of recovery, however slight' renders the evidence of such declarations inadmissible (*Per Tindal J* in *R v Haywood*, 6 C & P at p 160). We as Judges must be perfectly satisfied beyond any reasonable doubt that there was no hope of avoiding death. See also *Will's Ev* 196. There must be a belief in death indeed in an instant or immediate death (as held in *R v Osman*, 10 Cox 111; *Lush L J* and *R v Mitchell*, 17 Cox 503, per *Cave J*), but in an imminent and impending, as distinguished from a deferred one (*R v Perry*, [1900] 2 K B 1; *R v Austin*, 8 Cr App R 27), *Philp Ev* 309.

History—English Law "This exception to the rule against hearsay is the most of the others existed long before the rule itself, an example of which is occurring in 11th C. *Held Soc* 11, 27; see also *Plac Ab* 104 Cl. and *Cl. Glam*. "Inces of its adm 100 11th C. the establish 1333-4. Dow declarations in the case of civil *Dryden 1 M & W* 615 629) *May* Ed) 340 360, *Salmond's Essays* 82, *Wigmore Ev* 3 Ed 305.

Difference between English and Indian Law In England dying declarations are admissible in criminal cases in the single instance of homicide, that is murder or manslaughter where the death of the deceased is the subject of the charge, and circumstances of the death are subject of the declaration. *See Anglo Ind Case Vol II* 32. See also 1 *K. & P. C.* 353, *R v Wood*, 2 B & L 603, *R v Hill*, Bell 253 *R v Hutchison* 2 B & C 603. The object of the Court in *Stobart v Dryden 1 M & W* 613, render it very doubtful whether dying declarations would be admissible in civil proceedings. *See Cr. 2064*, 1 *Philp Ev* 200; *Taylor Ev* 10th Ed § 714. But in India they are admissible in civil suits as well as in criminal prosecutions for rape or any offence [11th illustration (a)] This illustration is probably based on *Cl. & P.*

The earlier law admitted dying declaration in civil cases. *Jackson v Fr* 11th Ed, 1 John 159 163 (1806). Thus it has been recognized where a witness being in extremis acknowledged the forgery of a will. *See 11th Ed, 11th C. 3 Barr* 1244 (1761). So the statement of a dying witness of her child "I will have died with a in her hand" *Douglas v* 11th Ed, 11th C. 377, 378, 379 (1761).

In that case *Parke B* exploded that any solemnity of the occasion was necessary to a declaration.

which is now generally in the ground of the

Bissorunjun Mookerjee, 6 W R Cr. 75, *Lalji v. Emperor*, 6 P. 717, *Queen v. Ugrail*, 2 N. W. P. 212. In that case where in admitting dying declarations in a case of rape the Court consisting of *Kemp* and *Markby JJ* said, "It seems pretty certain that the law in England on the subject has been much narrowed of late years. There are instances in the older books in which dying declarations have been admitted in civil cases, and in no

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rule as laid down in

Neither in

the party making the statement is the
apply with equal force to its admissibility in
which dying declarations are admissible;
rant is in a
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put on a level with a deposition, technically so called, which is admissible in

is it the reason why this evidence is admitted, but, even if it were so, that
necessity is just as likely to exist where the deceased person has been robbed, or
raped or assaulted, as where he has been murdered; see also *Queen v. Ugrail*,
3 N. W. P. 212. In England, to render a dying declaration admissible, the
declarant must have been in actual danger of death, he must have been fully
aware of this danger, and death must have ensued. *Taylor Ex* § 718, *Sussex*
Peerage Case, 11 Cl & F 108, *R v. Curtis*, 21 T L R 87, *R v. Woodcock*, 1
Leach, 500, *R v. Osman* 15 Cox 1; *R v. Gloster*, 16 Cox 471, *R v. Forster*,
It is not necessary

John, 1 East P O 337; *R v. Woodcock* 1 Leach 500; *R v. Morgan*, 14 Cox,
337. But in India the statement
was or was not at the time when;
v. Digamber, 19 W R Cr 44,
v. Premananda, 52 C 987-29 C . . .
dying declarations for under a
facts made by persons who are dead are themselves relevant facts when the
statement is made by a person as to the cause of his death and as to the nature
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S. 32. examined in Court before the presiding Judge S. 32 provides an exception to the rule that a declaration made by a person in the Indian Penal Code must be given in Court by s. 32. 1932 Lah 14. Before the passing of the Indian Evidence Act, India was somewhat on the same footing as in s. XXV of 1861, the declaration of a deceased person, "at the time of making such declaration, believed himself to be in danger of approaching death," although he is not a person within the meaning of s. 29 of Act II of 1861, shall be received in evidence, and then thought himself to be in the danger of approaching death," etc. "Both these enactments, then required that, before a dying declaration is received in evidence, it should be proved that the person making it

statement shall be received in evidence. *Tinoo* 15 W. R. 11 at p. 13. See 76, *R. v. Syamder Singh*, 9 W. R. 100. point even with the English law. It is not to entertain no hope of recovery (XXV of 1861) and the old Evidence Act

provided a hope of recovery. By the present Act it matters not whether it existed even any exception of death at the time of making the declaration. *Ev* 175; *Empress v. Bitchyuden*, 6 C. L. R. 278. A dying declaration made at the time when a person is in a precarious condition does not cease to be admissible and become inadmissible under s. 32 of the Evidence Act merely because a few days more. *Thakur Singh*, 1 L. R. 1029. A. I. R. 1929 Lah 64. According to the law, declarations are admissible when a person has died in a hospital after being attacked by the injuries but was cured by medical treatment. *Ev* 175, held that the dying statement of a person is not admissible in evidence in a trial of the person who caused the death of a deceased under s. 32. *Wali Mohammed v. Emperor*, 126 Ind. Cas. 311. 31 (L. J. 1903) = A. I. R. 1930 Oudh 249. So also where a woman who was alleged to have been raped and who committed suicide three days after the incident was proved to have made a statement shortly after the rape to one of her relatives. *Held* that the rape not being the cause of death her statement was not admissible in evidence under s. 32 (1). *Kappinarah v. Emperor*, A. I. R. 1931 Mad 100. 1930 M. W. N. 702.

the necessity from any of the declarations

It is not necessary for the purpose of the Act to require the declaration to be made in the presence of a magistrate or a judge.

(c) Its limitations are heresies of the last century which have no sanction of antiquity. They should be wholly abolished by legislation. *Ev* § 1436

Subject matter of dying declaration A declaration made by a declarant S. 3

It 509 The deceased declarant must be the person whose death is subject of the charge *R v Mead* 2 B & C 605, *R v Hind*, 3 Cox 300=23 L J M C 117 In *R v Mead*, the dying declaration of *Lau* after giving an account of the circumstances under which he was shot by *Mead*, proceeded to negative his having been present at, or having had any concern whatever in, the smuggling transaction deposed to delivering the jug cannot be received ed to a confession by the party himself of a very heinous offence he had committed The same observation applies to the case of *Wright v Tetter*, 3

of the charge, and the circumstances of the death the subject of the dying declaration See also *R v Hichison*, 2 B & C 608 (notes) *R v Merton* 3 L & L 492 So the statements of a deceased person made prior to his death as to the cause of his death, or as to any of the circumstances of transaction which brought about his death are relevant as against all the accused *Klania v Crown* 67 P L R 1905=2 Cr L J 237; see also *Mur v Emperor* 81 Ind Cas 964=4 Lah 151 *Wali Mahomed v Emperor* 126 Ind Cas 511=A I R 1930 Oudh 749 The reason of the rule is thus stated by *Angman, C J* in *State v Lohan*, 15 Kan 413 Mr *Pelfield* states that this evidence is not received upon any other ground than that of necessity, in order to prevent murder going unpunished Its admission can be justified only on

an extent, where the death of any one else than the declarant is the subject of the inquiry, as to justify the adoption of rule admitting such testimony So the declaration may not concern any and all topics It must concern facts leading up to or causing or attending the injurious act which has resulted in the supposed necessity for the foregoing limitations it will as introduced by *Sergeant*

East in Pleas of the Crown Vol I p 303, where he said Besides the usual evidence of guilt in general cases of felony there is one kind of evidence more particular to the case of homicide which is the declaration of the deceased after the mortal blow as to the fact itself and the party by whom it is committed Evidence of this sort is admissible in this case on the fullest necessity, for it present to be an eye witness to the deed of other felonies namely, the party to further and equally necessary results

(1) If the killing was not secret, or if other and adequate testimony as to the circumstances of the death is at hand nevertheless the dying declaration is admissible even though in strictness it is not needed

(2) Where the fact of the killing is conceded the dying declaration under the spurious principle is by hypothesis unnecessary, nevertheless, this result is not recognized, the declaration is admitted even where the killing is conceded *Wigmore* § 1435

Where in committing a dacoity the dacoits caused the death of a person the latter's dying declaration as to what was done by those concerned in the dacoity, in which the murder was caused was held to be not only relevant against the person who actually caused the death but also against those concerned in the dacoity In *re P Subbu Tejan*, 2 Weir 700, see also *R v Balcer*, 2 M & R. 53

S. 32.

The dying declaration must

the mouth of a witness—c 7, 1

Taylor L. § 720, R. v. Sellers, Carr

be, it must be complete in itself;

to qualify it by other statements, which he is prevented by any cause from making, it will be received Taylor L. § 621. Section 32(1) does not cover only statement made by the person when he is dying from the result of the injury which caused his death but also covers the statement, as to the circumstances of the transaction which r

causing the death was inflicted

50 B 633-28 Bom L R 10

1924 Nag-115, Emperor v. Jhark, 20 P R 1916 Cr-35 Ind Cas 998-41 P

L R 1917, but see Amar Singh v. The Crown, 1 Lah 451-A I R 1924 Lab

253, where it was held that dying declarations are statements made by a dying person as to the injuries which have brought him to that condition or the circumstances under which the injuries were inflicted and as such, statements

person and that treatment is the cause though not the direct cause of the death the whole affair, ill treatment and subsequent suicide, forms one transaction and, therefore, statements, made by the deceased, as to the cause of his death are admissible in evidence under section 32(1) of the Evidence Act Emperor v. Fariz 35 Ind Cas 998-20 P R 1916 Cr-47 P L R 1917. The motive for a crime is of course a rule

Where the statement

reference to the motive

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of the circumstances, if

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any act of the deceased

and her make the statement Emperor v. Fariz 35 Ind Cas 998-20 P R 1916 Cr-47 P L R 1917. The motive for a crime is of course a rule

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42-8 C L R. 273 "A statement of a witness as to what he heard from

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574-28 C 39

injured person

know more or as much about the circumstances of his death than or as any other person So this doctrine does not apply where the object of the trial is to ascertain whether certain persons are the dacoits or not—a matter which has nothing to do with the declarant's death Nga Te v. King Emperor, 20 Ind Cas 90-14 Cr L J 510

Surendra Nath, 20 Ind Cas 90-14 Cr L J 510

Dr. J.

25 Cr. L. J. 29. "The cases all S. 3
a case where the evidence would

observed by him, the in
by the jury so that the witnesses' inferences become superfluous Now since

At § 2849, see also *Hanery v Comm*, 5 Cr Law Mag 47; *R v Scarfe*, 1
M. & R 351.

Scope of declaration—Emotion excluded. The dying declaration must be
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berlayne's Ev. § 2850.

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ment in respect thereto is therefore admissible, where deceased was in a position
to know the truth. Indeed, even where a certain element or degree of inference
is necessarily present, *e g*, where the assailant is masked, or in ambush the fact

absent, and the evidence as contained in the dying declaration will be rejected
in the absence, however, of evidence on the point, intrinsic or extrinsic the

the statement should directly charge the accused with being the assailant.
Where dying declaration was as to the identity of the accused, it was held
that the declarant might be impeached by showing that the deceased was in the
habit of mistaking her friends for persons whom they did not resemble
Chamberlayne's Ev § 2851.

Scope of dying declaration—Inference. So far as practicable, adminis-
tration confines the dying
properly take were he a witness
or judgment, is to be excluded
employing it. Very plain is
statement by the deceased
that he had been told such was his intention. The mental state of a third
person is not subject to direct observations. The statement of a dying declar-
ation in regard thereto may therefore be rejected as an inference. The declar-
ant's own mental state, being a subject upon which he might properly testify
as a witness, may, however, be established in this way. A sufficient adminis-

S. 32. trative necessity for accepting an inference or conclusion in a dying declaration is furnished where a large number of minute phenomena, often so intricate and interblending as to forbid effective individual statement, are given by the declarant in the form of a collective fact, often the only way in which the speaker can well express himself. Thus a declarant may properly state that a given shooting was an 'accident' or that he had been 'butchered' by the mad practice of a doctor, and so forth. *Chamberlayne's Ev.* §§ 2852, 2853

Testimonial qualification of the declarant is admissible only as to matters to which he is sworn in the case. *Taylor Ev.* 117. Declaration of a child of such tender age as to be incompetent to testify on the doctrine of a future state was rejected. See also *R v Drummond* 1 Leach 61, 338, *R v P Donnelly* 100, 101. A witness sworn in *People v* ... is on the same footing as the testimony of a witness sworn in the case, and are governed by the same rules.

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under s. 118 of the Evidence Act. *Sanjivani v King Emperor*, 5 O C 246. ^{where a Court could not find the witness competent}

time or by conviction of crime, or by subsequent or prior inconsistent statement. *Wigmore* § 1446. In *State v Thaulcy*, 4 Harringt. Del 562 general evidence of the declarant's intemperate habits and of his low state of health at the time was held to be inadmissible.

himself responsible for his own death or that the fatal result was an accident or, as the earlier law used to say, by misadventure, may be within the proper scope of a dying declaration and even add to its probative force. To be received in evidence a self-serving statement must, however, fulfil the conditions laid down for the reception of a dying declaration. *Chamberlayne's Ev.* §§ 2816, 2817.

Form of dying declaration. The form to be used in making a dying declaration is not prescribed by the Act.

been inflicted on her, that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution and admitted by the Sessions Judge, to prove the questions put to the deceased, and the signs made by her in answer to such questions. *Held* by the Full Bench (*Mahmood I* dissenting) that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of s. 32 of the Evidence Act, and were therefore admissible in evidence under that section. *Queen Empress v. Abdulka*, 7 A 385 (T. B.)

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questions put, it is admissible in evidence. In such cases, however, the statement should be a true record of what in point of fact occurred, and should bear on its face the questions put and the nature of the fluctuation made in response. *Bulla v. Empress*, 2 P. R. 1886 Cr. Where a person whose throat had been cut as a result of which death ensued later, made certain gestures in reply to questions put by the police. *Held*, the gestures were admissible in evidence. The interpretation of the gesture is for the Court alone and the opinion of witnesses as to their meaning is not evidence. *Chandrika v. Emperor* 1 Pat 401 = 3 Pat L. T. 771 = (1922) P. 535 = 71 Ind. Cas. 353. Where shortly after the deceased had received the injury a Magistrate proceeded to record her dying declaration in the hospital and although she could not speak in answer to questions put to her pointed out the accused as the assailant. *Held* that questions and answers taken together might properly be regarded as verbal statements made by a person as to the cause of her death within the meaning of section 32 of the Evidence Act and were therefore admissible. *Emperor v. Sadhu Churn*, 26 C. W. N. 111 = 49 C. 600 = A. I. R. 1922 Cal. 109 = 77 Ind. Cas. 993; see also *Ranjan*;

Ev § 153 (b), *Mocub*
Steele, 12 Cox Cr. C.

Patchatt his story, then when dying and being asked what happened, he said, "Tell him, Patchatt" and *Dr. Patchatt* reported the story in declarant's presence. In admitting it 'himself' declaration of a deceased.

shown by the witness to have reference to the infidelity of deceased's wife. *Chamberlayne's Ev* § 2811. So it is clear that dying declarations may be communicated by any adequate method of communication whether by words or by signs or otherwise provided the indication is positive and definite, and seems to proceed from an intelligence of its meaning. *Wigmore* § 1415.

and answer is not admissible
and so must the questions
seem to me to be useless

been made for another purpose as the message to the wife of the injured man. No requirement is imposed, for example, that the declaration should all have

the declaration to give the family of certain deceased. *Bishan Singh v. Crown*, 8 L. L. J. 296 = 96 Ind. Cas. 215. 27 P. L. R. 181 = 27 Cr. L. J. 903 = A. I. R. 1926 Loh. 196.

First Information report. The First Information Report is admissible under this section as a dying declaration where it is the statement of a person

32. who is since in death *Ra* R. 1930 Lah 400, see also *Imperial, A. I. R. 1931 Lah 103=1931 Cr C 167.* which read J 475=A I Gajjan Singh

ing declaration is admissible A admissible even when the charge is

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Evidence Act R Cr 70, that of English

A dying declaration charged with the offence of homicide *Dusadh v Emperor*, 6 Pat 44-1 Cns 698-29 Cr L J 106=A I R. 1928 Pat 162.

Dying declarations made by an accomplice The dying declaration of an accomplice is admissible where the prisoner is charged with assisting the accomplice to commit suicide. *R v Smith*, (1897) 18 Cox 470, *R v Beziey*, (1906) 70 J P 263, *R v Stevens*, (1904) 4 N S W State Rep 727; Russ Cr 200; *R v Tucker*, 1 East P C 353. In *R v Jessop*, 16 Cox. 204, on an indictment charging with murder the survivor of two persons who had agreed to commit suicide together, Field J admitted statements by the deceased, made when purchasing poison in the absence of the prisoner, on the ground that the acts and words of the deceased in carrying out a pre arranged plan were evidence against the prisoner. Dying declarations in favour of the party charged with influence on the

clause but is admissible under clause (3) *Sheik Shafi* Nrg 259-124 Ind Cns 459-31 Cr L J 661; see also *Unia v. Emperor*, A I R 1925 P C 52-6 Lah 45-52 I A 121 P. C. 3 Lew 150, *Arribold* accomplice, as in an *Sadler*, (1911) 10 complice incriminating, admissible under the Emperor, A. I. R. 1930

Proof of dying declaration A dying declaration may be either verbal or written. A verbal dying declaration recorded by a Magistrate cannot be received in evidence, when it has not been proved by taking the statement of the Magistrate *Shia v Crown*, 17 P R 1911 C 1912-14 Cr L J 131 18 Ind Cns 583. When what purpose person is not taken down by the court

Boulter Ah, S C 19 1900, the dying declaration of a deceased is admissible in evidence and is to be put in the document itself and is not to allow him to give evidence orally as to the dying declaration. So a dying declaration certified in Court that he had recorded it proof of its own contents, and it is unnecessary that the person who recorded it should repeat exactly what was said *Prot P*

sary that the person who recorded it should repeat exactly what was said *Prot P* Singh v Emperor, 7 Lah 91-92 Ind Cns 167-27 Cr L J 215=A I R. 1922 Cal 382

may arise whether it is his own or otherwise, and may be offered as his declaration. The dying statement of a accused; if not so taken,

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the writing cannot be admitted to prove the statement made. The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness's memory. *Empress v Samundlu* 8 C 211, *Sarat Chandra v Emperor*, 52 C 116=28 Ind Crs 860=26 C L J 1211=A. I. R. 1925 Cal 821. A declaration made by a person in expectation of

relevant fact to be proved was the statement made by the deceased person admissible under section 32 of the Evidence Act. That statement is not the document

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to refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made. I would lay stress upon this because in many cases irregularities of this nature have led to a miscarriage of justice or to great delay in the trial of cases. I may note that the record by the Magistrate is in English. It clearly does not contain the exact words used by the accused which alone would detract considerably from its value as a true

v. Emperor, 67 Ind Crs 577=23 Cr L J 417=1 U P L R (L) 43. *Gowdas v Emperor*, 2 Ind Crs 841=26 C 629=13 C W N 680=10 Cr L J 186. A dying declaration was recorded in the presence of a witness, read over to the deceased in the presence of the witness and admitted by the deceased to be correct. If the witness, who heard that statement swears that the written statement correctly reproduces the words used by the deceased, that is sufficient to prove that the deceased did use the words contained in that statement. *Emperor v Balaram* 49 C 358=(1922) A I R 38. A dying declaration recorded, in the absence of the accused, by a Magistrate, who held the enquiry preliminary

289 P L R 1912=18 Ind Crs 883. The proper method of proving the oral statement is that the witness should be asked to repeat the statement if he hears it. *Emperor v L J* 1129 should be sent if

3. 32. the presence of the witness, the witness would be entitled to refresh his memory if he so wanted, by referring to such writing; otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused. Where the deceased dictated his statement and it was taken down and he then signed the statement after being satisfied as to its accuracy such writing may be regarded as a statement of the deceased in writing although under s. 32 of the Evidence Act. But even if what was stated was taken down by some one in writing a witness who heard the And ordinarily it would to reproduce from memory what he heard the deceased stated in addition to

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M L J 401 Although a dying declaration is not recorded in writing evidence of what the deceased said is receivable. In re Hanumanth 2 W L R 1921, Kusal Singh In re A statement made by the deceased cannot be used in evidence.

W L R 753,
deceased

ed in a witness Lachmi v Emperor, 31 A statement of a deceased person is not admissible in evidence of his not having a son in case of his not having a son. Jay Kumar v Sita Prasad, 12 C L J 507.

95 Ind Cas 385 Dying declaration of one direct about circumstances of a party is not admissible against other direct. Danna Singh v Emperor, 80 Ind Cas 613-26 Cr L J 517-A I R 1920 All 237

Section 164 of the Criminal Procedure The deceased made a full statement, about an assault which resulted in his death, before a third Magistrate. The statement was not taken into consideration by the session.

It comes in to consideration by the session where the witness who

recorded the statements was empowered under s. 161 is immaterial *Rahman v. S. Emperor*, 131 Ind. Cts. 117-32 Cr L J 1118.

Rule of Preferring Written Testimony. "The principles which determine whether a written report of another person's statement is to be preferred to oral

examination; for such a person has no duty or authority by law to report dying declarations, and it would be solely by virtue of an express duty that a Magistrate's report could be preferred to other witnesses. (b) When a written memorandum or report thus made is read over to the declarant and signed or assented to by him, the writing thus becomes a second distinct declaration by him. The first oral statement is not merged in the latter written one, because,

(c) Where the declarant makes one oral statement, and afterwards at another time a second statement, the latter being in writing or reduced to writing, there are here two distinct statements, and either one may be offered without testifying to the other; for the principle of completeness requires only that the whole of a single utterance should be offered together, and in the present instance the

theas making
It is thus clear
written one has

been proved; (2) that, even before or without proving the written one, the separate oral ones are admissible—though on the latter point the Courts are not always explicit. *Wigmore* § 1450, see also *R v Reason and Transfer* 16 How St Tr 83. In that case *Pratt L C J* said 'You know in the Court of Chancery when the party is examined on his oath, he gives in a first answer

the same person that enquired of him before, and all this is done in order to perfect and consummate the examination whether you will not take them both together as one entire account given by the deceased?' In the same case *Fortescue J* observed "I think we should allow what was said at other times to be given in evidence, because the first is no examination, because no Justice of the Peace was then present, so that the examination stands distinctly by itself." The opinion of *Fortescue J* prevailed. *Wigmore* § 1450

Evidence Act, to corroborate his evidence *Emperor v. Ram Sattu*, 1 Bom L R 431

32.

Stage at which dying declaration should be made The necessity of recording a dying declaration arises only when the hopes of life of the man are given up. *Upendra v Emperor*, 129 Ind. Crs. 676=32 C L J 425

English and American following (1) The all deceit. There be furthered (2) If a belief Higher Power upon human ill doing, the fear of this punishment will outweigh any possible motive for deception, and will even counter balance the inclination to gratify a possible spirit of revenge. (3) Even without such a belief there is a natural and instinctive awe

shown (profane language) was important in another point of view. It sits at the very foundation of the reasons upon which dying declarations are admitted at all. There are certain guarantees of the truth of dying declarations, growing out of the solemnity of the time and circumstances under which they are made.

It was clearly the right of the accused to show that the deceased in making the statement was not in that frame of mind which the law presupposes and requires in such cases that the deceased was in a reckless irreverent state of mind and entertained false views of all that he felt towards the accused.

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in her mind could have had that idea of a future state which is necessary

it was received heaven if he told the truth

under English and American law. *Vide Woodcock's Case*, Leach Cr. 220

think I ought not to say that I was fully convinced that the deceased was in such a state of mind as to be able to recover, as he was a kind who have no conviction that their death is near approaching, and that he placed all his trust in the fact that he was very near, and that he

I think there is no sufficient proof that he was without any hope and that I, therefore, ought to reject the evidence." But even in cases where the guarantees of the trustworthiness of dying declarations are present,

must receive it with certain degree of caution. It may be seldom that a dying
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generally given by relatives and friends of the deceased who had watched by his bed side, and bias in his favour is to be expected. And even if given by police officers it should be carefully examined. The declarations are liable to be misunderstood, and to be reported by an unfaithful memory, especially if much time has elapsed since they were made, and the evidence goes to the jury with mind emotions of deep sympathy against the accused. There is credulous of the entire integrity of declarant is apt to make his own and to be rid of the importunity

and annoyance of those around him, he may say whatever they choose to suggest. So, too, as respects the declarant's statements, it is to be remarked that many persons, even in serious conversation, assert as facts those things of which they have only strong convictions and not knowledge derived from senses. If the declarant related his opportunities for observing the facts stated and they appear to be ample, this would add to the repeated his statements rationally and speech " *Moore's Weight and Value*." After a dying declaration, or any other to be given to it is a matter exclusive not believe it,

by rules of law to have been or though they do suppose him to have been thus conscious they may still not believe the statement to be true. In other words, their canons of ultimate belief are not necessarily the same as the preliminary legal conditions of admissibility whose purpose is an entirely different one. *Wigmore* § 1451. In deciding as to its credibility the jury should consider all the evidence in the case, including any which may have come to their attention during the preliminary hearing on *voir dire*. The credit which the jury may be disposed to give may one of fact, on the

So, as to whether a duress is a question for them. The jury may reasonably find that the probative force of the dying declaration is increased by the fact that the speaker is not possessed in favour of his own side of the contention. The facts stated in a dying declaration thus seem to be not conclusive upon the jury. *Clamberlayne v. Ly* 2838

Weight for the Jury—Impeachment. When the statement of a witness previously made is used as evidence under the provisions of this section then any other statement made by that witness can be used by virtue of § 153 for the purpose of contradicting that witness as if such witness had appeared in Court

5. 32 is clearly within the rights of the accused. The effect, however, of the most conclusive demonstration of the falsity of the dying statement in some particular case where the declarant enumerates among his assailants one who could not have been present, does not affect the admissibility of its weight. The accused may impeach the declaration by showing that the declarant at other times *Niamat v Emperor, A. I. R. 1930 Lah. 409=31 P. L. J. 111*. Indeed, it is his right to establish that fact if it is within his power to do so. The existence of such inconsistent statements, even that of a contradictory dying declaration, does not warrant the rejection of an evidence or require that it be stricken out, probative efficiency of the latter. Should it may, relies upon a dying declaration of the deceased to impeach the latter in any way appropriate to a witness. For this purpose, it may show, if it can, that the declarant has made inconsistent or contradictory statements.

The accused may at all times introduce evidence tending to show that the deceased was without a proper sense of moral accountability, or that a sense of impending death would fail to clear his mind of bitterness or falsehood leaving a controlling desire to tell the truth. That he was in the habit of using profane or indecent language or suffered from other moral obliquities e.g., the habit of drinking intoxicants to excess, may be shown. Conviction of crime may be a relevant fact in such a connection. Similarly, while evidence is not admissible to establish the general bad character of the deceased, the accused may prove as he might in case of a witness, that he believed and that this reputation for truth where he resided. That the actual state of mind of the accused at the time of making his statement was one of great animosity, recklessness and thirst for revenge is also a relevant fact. Lack of belief in a future state of rewards and punishments naturally affects, as has been noticed the character and the fact may be relevant and the fact may be the credibility of his statement. Disbelief of such a nature will not be assumed but must be affirmatively shown. *Chamberlayne's Ex*

§§ 2864, 2865, 2866.

Mental state of the declarant. To enable the jury properly to judge of the probative force of a dying declaration, the jury are entitled to be fully informed of the circumstances under which it was made. Prominent among these is the mental condition of the declarant. Thus they are entitled to view from all angles, reaching a conviction of their own as to an actual sense of impending death experienced by the declarant at the time of making his statement and as to the value of the declaration.

declaration to be admissible, must have been the utterance of a dying declaration. *Chamberlayne's Ex* § 2867.

Value of declarations in a dying declaration. In the case of a dying declaration which by the law of England assumes a character very widely different from what it is under the English Law, which is relevant under the Evidence Act, whether the person who made it was or was not at the time when it was made under expectation of death, and the weight to be given to it is a question which it is made of it, *Chamberlayne's Ex* § 2867.

be relied upon or not." No statements made by a dying man relating to the cause of his death are admissible in evidence against a person causing his death, but too much reliance cannot be placed upon the details of such statements as they are hearsay. *Emperor v. Salim Bena*, 76 Ind Cas 389. It is not safe to base a conviction on the uncorroborated dying declaration of a deceased person, for it is well known that the inhabitants of the Punjab will often in a dying declaration not only accuse the actual offenders but will also include the names of other enemies. *Bikkesh Singh v. Emperor*, 86 Ind Cas 826 = A I R 1925 Lah 519, see also *Stephen's History of Cr. Law*. Mr Justice Stephen also said

known in the Peshawar division that a dying declaration as to the cause of the declarant's death is admitted in proof of the matter stated. The effect of this was that whenever a man was mortally wounded, and found himself dying

This is very far indeed from the way in which a dying Punjabi looks at the subject. His

his dying declaration
'Dying declaration'
England. Very often the murdered man himself, before his death implicates every male member of his su

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and proved by the clearest and most reliable evidence to be the exact words of the person making it, and corroborated by the surrounding circumstances, is sufficient to support a conviction for murder under s 302 I P Code. *Karim Khan v. Crown*, 4 P W R 1909 Cr = 9 Cr L J 156 = 1 Ind Cas 100. But a Court should be careful not to be misled by the violence, confusion, or the fact that the declarant is deceased.

Crown, 117 P R 1866, *Sher Ali v. Crown*, 8

202 N Y 491 (500). Much weight must be given to the dying declaration recorded by the Magistrate where it is supported by the consistent evidence led on behalf of the prosecution. *Sauan Singh v. Emperor* 10 Lah L J 281. It is not itself in its various forms for the sake of argument such declaration is for all practical purposes negligible. *Inayat Ali v. Emperor*, 103 Ind Cas 526 =

32.

dent corroboration of facts and circumstances to prove that offence *Battu Singh v Emperor*, A. I. R. 1929 Pat 219. In England questions of admissibility arise chiefly with respect to the mental condition of the declarant. To make such declaration admissible in England there must be a "settled hopeless expectation of death not qualified by any prospect of recovery, however slight." In India they are not under the section;

h, that statement is relevant not entitled to particular after the occurrence it may for his friend to suggest

falsehood. But if the man is in bed in hospital for four days after the event and a month before he dies and makes a statement, that statement carries no more weight than if he made it in the witness box, and rather less, because he has never been cross examined. Under these circumstances it is incumbent on the

Dying

regarded as

to questions,

& P. 238, L.

711, *R v Bottomley*, 118 L. T. 88; *R v Fitzpatrick*, 46 Ir. L. T. 173 (1911).

But in *R v Mitchell*, 17 Cox C. C. 503, *Care J* said "Where a statement

is not the *ipsissima verba* of the person making it but is composed of a mixture

of questions and answers, there are several objections open to its reception

in evidence, which it is to be able to do so in cases in which the

person has no opportunity

may be leading to

declaration there is

without their force and effect being freely comprehended. In such circumstances

the form of the declaration should be such

was the question and what was the answer

suggested by the examining Magistrate and how much was

person making it. See also *R v*

17 T. L. R. 552. On the other hand

311-115 L. T. J. 88, *Laurence*

question and answer was admissible, although the answers only and not the

questions had been taken down. In *R v Corbett* (1903) Queensland S. R. 41

Griffith C J said, that *R v Mitchell*, unsettled what had before been the law

and followed *R v Smith* saying further that it is not essential that a dying

declaration should be proved by a doctor. *Pleadings* 21th Ed.

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ed told the police *Emperor v Sikandar*, A. I. R. 1910 16 Ir. L. R. 173, it was held

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the value and credibility of the declarations. Therefore, it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation *Russ Cr.* 2092; *R v Reason*, 1 Str. 499; *R v Woodcock*, 2 Leach. 51; *R v Welburn*, 1 East P. C. 358; *R v. Smith, L & C.* 607, *R v. Steele*, 12 Cox. 168, *R v Whitmarsh*, 62 J. P. 683, 711.

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expressed by the declarant; it must be complete as far as it goes. But it is immaterial how much of the whole affair of the death is related, provided the

§ 1448 Administration by no means requires that the extra judicial statement

to appear, the dying declaration will be rejected as incomplete *Chamberlayne's*

26 Cr L J 1256=52 C 987 It must be taken as a whole and a portion of it cannot be allowed *Infr v Imperor*, A I R 1930 Cyl 211=50 C L J 584; 22 M L J 435

prisoner there seems no reason to doubt the propriety of admitting a dying declaration which is in favour of the prisoner. Indeed, almost every case of man-slaughter, in which such declarations have been admitted, is an authority

him, but rati
"Owing to
for homicide

it has sometimes been argued that the declaration cannot be used by the accused. But the argument has no foundation whatever, and has been generally repudiated. *Wigmore Ev* § 1452, see also *Mattox v U S*, 146 U S 151, *Moore v. State*, 12 Ala 767; *People v Southern* 120 Cal 645, *Com v Bednorski*, 261 Pa 124

Nature of dying declarations "Where statements are made by the deceased at different times, all may be proved as his dying declarations if all are

administrative precedence over the remainder. And one among several written statements may be proved without producing the others. Naturally, there is no

5. 32 preference between oral statements made under similar condition and direct times' *Chamberlayne's Cr* § 2847

Dying declaration
 captured in a
 ration as to the
 the circumstances causing his death, and in it he stated that he was
 admissible to prove his own participation in the dacoity but was not admissible
 against the other accused *Dattu Singh v Emperor*, L R 5 A 201 Cr When
 the declaration of a person wounded by the accused in committing dacoity was
 made on the 13th August 1899, and he died on the 20th of that month and there
 was no other evidence
 wounds received at
 his death, the High Cr
 in evidence *Imperial v P. d. 25 P 15-2 R. 1 J R 331* In a case of
 murder the statement
 presence of a head
 1872, that section
 who made the state-
 tion of death *Qu*
 certain statements relating to the cause of the
 the investigation of a criminal case, held, in
Bahawala v Empress, 17 P R 1886 Cr A
 was dying at the time he made it is a dying
 term and is admissible under this section, the
 lingered for six days afterwards and then died *Thakar Singh v Emperor*
 A I R 1929 Lah 61-10 L L J 163 The statement of a deceased person
 was recorded in the absence of the accused Subsequently in the presence of
 the accused, the statement was read over and the accused were allowed to cross
 examine the dying person Held that the statement was not a dying deposition
 under s. 33 of the Evidence Act, and was not admissible under section 37 (1)
 unless it was proved by examining the Magistrate who recorded it or so as to
 who heard it made *Njo Po v Emperor*, 14 Cr L J 396-20 Ind Cas 200
 Bur L T 68 The statement of a deceased person that she was confined in the
 house of an accused, that he was keeping watch over her and that another accused
 had raped her on account of which she had become pregnant and that they
 were getting ready to give her medicine to miscarry and so to put an end to her
 life is admissible under s. 32 (1), as a statement made by a person as to the
 circumstances of a transaction which resulted in her death in a case in which
 the cause of death comes into question *Wahid Bux v Emperor* A I R 19
 Sind 250

CLAUSE II

facts asserted oral declarations

namely (i) the necessity that the statement should be made by a person of sound
 knowledge, (ii) that it should
 entry of any collateral fact
 person entering it to record
 the Legislature, so that Cor
 any evidence which falls within the terms of the present section
Cr 163

Principle.
 evidence is admissible
 principle, and (2) it

Necessity principle On the principle of Necessity this exception is made
 the use of statements by persons who are competent, though not necessarily the
 sole evidence available on the subject, is yet the only testimony now available

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 C 271 P 1
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 Engl 3 Cr
 163

with clause (a) such
 ally, (1) the
 of Trust or

affords the greatest security for truth. Their declarations verbal or written, must, however, sometime in order to prevent a

abandoned and can no longer be traced, his extra judicial declaration made in the course of business or official duty will be received in evidence *Chamberlayne's Ev* § 2879. Section 32 provides that written or verbal statements made by a person who is dead or cannot be found are relevant facts in certain cases *Rama Sوام v Rama Nandan*, 22 Ind Crs 627=(1914) M W N 240=1 L W 136.

ments fairly trustworthy

- (1) The habit and system of making such a record with regularity calls for the influence of races and to *Dicas*, 1 Bing what is false, ly incurred

accuracy

- (3) If, in addition to this, the entrant makes the record under a duty to an employer or other superior, there is the additional risk of censure and disgrace from the superior and powerful and *Tindal C J* 811.

could be likely such the entry false would or *Ev* § 697, *layne's Ev* §§

32. Section 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The object of those restrictions in principle of legal evidence being follows that where persons can be what they know at first hand of cross-examination. Where however witnesses cannot be brought before the Court, their previous statements are at best indirect evidence, of a kind that the conditions which are imposed upon it, are imposed upon its truth. As there is to be no chance of testing a man by cross examination his statement will not be admitted unless it has been made under conditions which, looking to the ordinary course of human affairs raise pretty strong presumptions that it was a true statement. Thus the whole scope and object of section 32 centre upon securing the highest degree of truth possible in the circumstances for the statement. *Per Beaman J in Sethna v Utrala* 2 Bom L R. 1017 at p 1048

Statement made in ordinary course of business. This clause provides that a written statement of a relevant fact made by a person who is dead is itself a relevant fact in the ordinary course of business. The exact meaning is more than one place in the existence of any course of business.

4 Camp 193. The course plaintiff's counting house methodical cannot carry the so too by section 114 the Court is to be guided by what it thinks likely a natural event to the facts of public and private business such a case was meant to be or business, illustration (c) its well known transaction or trade. Again in the explanation to section 47 it is said that per in per me of a broke 'Ag course of Spinning the Privy 118=4 C in evidence none of or (as in banks) from hour to hour as transactions take place said) are, I think regularly kept in the course of business. Having regard, then, to the above considerations there can, I think, be no doubt that the expression 'in the ordinary course of business' in section 32 must be read in the same sense. It may in one sense be true that it is the ordinary course of business, for a mortgaged deed to contain recitals of the boundaries of the land mortgaged. But that would not make the recitals evidence. The question is, whether the mortgage deed itself is a statement made in the ordinary course of business. Looking at the particulars set out in clause (1) of section 32 the nature of the statements 'made in the course of business' and

looking at the sense in which the expression is apparently used in other sections
 ed deed executed by an
 fession, trade, or business'
 Act) of an agriculturist
ca v Bharmappa, 23 B 63
 at pp. 65-67. In the same case *Fulton J* at p 70 observed "It can hardly be
 said that the execution of a mortgage deed is an act done in the ordinary course
 of business. Doubtless when a person has determined to mortgage his land, the

v. Jeonandan, 13 C. W. N. 71) The phrase was apparently used to indicate
 the current routine of business, which was usually followed by the person

W. N. 71.

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Mass 481, *State v Phair*, 48 Vt 378; *Due v Sayer*, 29 Me 119 So also in
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 performed in one's
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 of doings kept merely for one's personal satisfaction, but it would not exclude

admitted Similarly in *R v Cope*, 7 C & P 726, an endorsement of service on
 an order of the aldermen, the writer's duty being to serve orders and endorse

C L J 155 Where account books are admitted in evidence before the Com
 missioner under section 32 of the Evidence Act, as having been kept in the
 ordinary course of business by persons deceased, it is in the discretion of the
 Court to hold that they are sufficient evidence of the transaction to which the
 entries
 L R. 81 and 10 Bom
 before 1 unately die l
 Evidence Act as being statement made by a dead person in the ordinary course
 of business and in the discharge of his professional duty *Mohan Singh v.*

S. 32. *Imperial, 12 R G All 19=55 Ind Cas 647=26 Cr L J 551-A I R 1936 All 413* *Jama wasil baki*, and *Jamabandi* papers can be admitted in evidence under this clause but it must be clear that the persons who made them are dead and that the papers were made in the ordinary course of business. An entry as to the rate of rent cannot be distinguished from other entries therein as are not made

usual is one, nor even that it should be a secular one, it follows that a register of marriages or the like is admissible. *Reed, Doyle, 16 All Mr* "An entry made in performance of a duty is admissible than one made by a clerk, or messenger or notary or attorney or solicitor, or a physician in the course of his secular occupation."

A deed of conveyance was tendered in evidence which purported to be the mark of G, as vendor, and which was duly attested by four witnesses. However, she denied that she had ever executed the deed, and said that the mark was not hers. All the attesting witnesses were dead. A witness was called who knew

11 B 600 In a suit to recover loss sustained on the sale by plaintiffs, of goods consigned to them by the defendant for sale by their London firm accountants are good *prima facie* evidence put in

26 Bom 253. Entries in this section as the register in the case of a *jayman* cannot be admitted to pronounce affirmatively "not of such a character as to enable the Court to find that the entries are in the ordinary course of business." *Ma C)=18 M L J 511*

mark is that of the executant is admissible in evidence under this clause if the writer is dead and it is proved that the document is written by him. *Lah*

v *Rangayan, A I R 1923 P 111=67 Ind Cas 57* Where a family pedigree was sought to be proved by books kept by a family chronicler, held that under section 32 (2) they would be admissible as books kept in the ordinary course of business by a professional chronicler. *Such a book Mohan Singh v Ind. Cas 235; see also*

Gobind, 48 Ind Cas 375 But entries in the diary of a deceased person relating to birth and death are not admissible under this clause. *Gobordhan, (1919) Pat 352=37 Ind Cas 421=2 Pat L J 42*

Statement includes verbal statement. The statement may be written or verbal (vide s 32). The general prevailing doctrine in America requires the declarations to be in writing; the exception relates to entries strictly speaking and does not extend to oral statements. *Wigmore § 1523* In England, however, it seems settled that an oral statement is equally admissible. In the *Sussex Peerage Case, 11 Clark & F. 85*, Lord Campbell says at p 113 "By the law of England the declarations of deceased persons are not generally admissible unless they are against the pecuniary interest of the party making them. There are two exceptions. First, where a declaration, by word of mouth or by

writing, is made in the course of business of the individual making it, there it may be received in evidence, though it is not against his interest." See also *Stapleton v. Clough* 3 El & Bl 933, 937; *Eddie v. Kingsford*, 14 C B 759 (763). In *Reg v. Buckley*, 13 Cox Cr Cas 291, which was a trial for murder, the prosecution offered to show the verbal report of the deceased, who was a constable, to his superior officer as to where he was going on the night of the murder. It seems he had reported that he was going to watch the accused, who on a previous occasion had been convicted of larceny, chiefly on the evidence of the deceased. It was held admissible. But in a recent case it has been held by one English Court, that a declaration made by a physician

is admissible, and it

is not, 22 T

Review 301

Since in that

jurisdiction the third motive of trustworthiness (*vide supra* under the head circumstantial guarantee of trustworthiness) is regarded as most important, and the statement must be made under a duty to a third person, it may be conceded that an oral statement would be scarcely inferior to a written one in trustworthiness. In this country, however, where that limitation does not obtain, the trustworthiness of an oral statement would seem to be far inferior to that of a written one, especially as affected by the second reason for the rule (*vide supra* under the head circumstantial guarantee of trustworthiness). Nevertheless, in the usual conduct of business by subordinates in mercantile or industrial houses (practically the only class of persons by whom oral reports are regularly made), the element

does exist

where it

English

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written statements and of the

made in most of the other

exceptions." The words "and in particular" in s. 32(2) seem to point to the superior force of written over verbal statements. *Natt. L.* 177

Section 32(2) and section 34. In *Rampyavabai v. Balaji*, 28 B 291-6 Bom. L. R. 50, the plaintiff relied on entries in the hand writing of her deceased husband kept in the ordinary course of business. The lower Court rejected certain items for want

the judgment observed

support of her claim. The accounts are relevant both under section 34 and under section 32(2) of the Indian Evidence Act, 1872. The learned Judge has considered that corroborative

the accounts without corroboration the only point being that the law does not require corroboration." See also *Must. Rani v. Firm Bahadur*, 62 Ind. Cas. 946. So also where entries in *Jama bandi* papers began over 70 years before the action was tried, the presumption was that the person who made them was dead and could not be called and as they were made in the ordinary course of business by the land-lord's agents, they were relevant without any corroboration, as evidence against the tenant under sub-section (2) of section 33 of the Indian Evidence Act which does not require corroboration is under section 34. *Dhukha Mandal v.*

32.

persons who
Kailash, 44 Ind
be evidence u
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v *Nauab Khaja Habibulla*, 31 C L J 63=47 C. 266=56 Ind Cas. 38, *Dulu v Jogadish*, 90 Ind Cas 564=A I R 1926 Cal 379 *Jonah Biswas v Sita Kumari* A I R 1927 Cal 855 But in *Gopeshwar* Cal 854, Mr Justice Mookerjee said "The

entry relevant under s 34 and one relevant under s 34 (2) witness while former case the person who made the entry may be available as a witness while in the latter case he is not I find it very difficult to appreciate on what ground the legislature could intend to exempt entries relevant under s 32 cl (2) from the disability that it imposed on entries relevant under s 34 by the second part of that section, and personally I have always felt inclined to take the view that such entries, no matter whether they are relevant under the one section or under the other, are not to be considered as alone sufficient to charge any person with liability"

English Law A declaration is deemed to be relevant when it was made by the declarant in the ordinary course of his duty as a witness in the discharge of professional duty

3 B & Ad 82

irrelevant ex

the ordinary c

by a person duly authorised to make them *Steph art 27* The leading case on this rule is the case of *Price v Earl of Turrington*, 1 Salk 285=2 Smith L C 320 The short report of it in *Salked* is as follows "The plaintiff being a

the Earl of Turrington for beer sold and to charge the defendant was, that the usual that the drymen came every night to the clerk of the warehouse and gave an account of the beer they had delivered out which he set down in a book kept for the purpose, to which the drymen set their names, that the dryman was dead but this was his hand set to the book and this was held good evidence of singly, without more' That case

Previous to that in *Pitman v Maddox*, 1 Loru Kayn, 100, 100 v Judge the plaintiff produced a copy of a book written by one of the

to be good evidence within the year alone *Phayer Cas. Ev 511*

Origin In England, formerly a party to an action was not permitted to testify in his own behalf An apparent exception to this rule, however existed in the application of the so called "shop-book rule" In early times in England parties were permitted to show, by entries made in their books, the sale of goods or performance of labour, of 7 Jac 1, C 12 was passed relevant portion of the authority of the

before the same action brought, except he or they, their executors or

tors, shall
said debt,
or admini

year next after the same wares delivered, money due for wares delivered, or work done." Later developments narrowed the rule to the cases where the entries

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required by the clerk who made them, if living and within reach; if he was not, proof of his handwriting was considered sufficient. *Pitman v. Maddox*, 1 L.L. Raym 732; *Price v. Earl of Torrington* 2 L.L. Raym 873. The rule with respect

as evidence through no absolute necessity, but by reason of a presumption of necessity only, inferred from the nature of commerce. See also *Woodnath v. Lord Cobham*, Bomb 180, *Lord v. Hopkins*, continued to go in, when the entries were the deed. There is reason to think that the when made in a stranger's books grew out of the practice in the case of a party's own "shop books." *Thayer Cas. Ev* 509

jecte l on the ground that
he is responsible. *R v*
558, *Trotter v Maclean*,
or *v Walmesley*, (1904) 2
d surveyor, employed by

recorded *Smith v Blaken* L R 2 Q II 332. See also *Iolena v Gray*, L R. 12 Ch D 411. *Lyell v Kennedy* 35 W R 725, *Stu la v Freccia*, 5 App Cas 623. In *Chambers v Bernasconi* 1 C & J 451, the Court rejected the

which the person is employ
the entry relates, and then

32. the duty must be proved by other independent evidence *Bright v Lejerston* 2 Deg F & J at p 614 *The Henry Cozon* 3 P D 156, *Doe v Tuford* L R 1 Q. B at p 332, *Pere R* 347 Personal c towards any person of costs delivered by him are not admissible on the ground that it was his duty to keep proper books, or that they were made out in the course of duty *Poe v Le* 321 see also *Bright v Lejerston* 2 Deg F & J at p 617, *Hop v Hyl* (1893) W N 21, *Leroy v Coulthard* (1897) W N 25, contra *Rush v Richard* 28 Berv 370 The acts must have been done by the declarant and not by third person *Smith v Blakey*, *supra*, *Ryan v Ring* 25 L R Ir 141 In *Polini v Gray* *supra*, James L J held that entry must not be to a thing said learned or ascertained by the declarant, but something done by, or to him and in *Lyell v Kennedy* *supra* Brown L J approved the statement *Plup v* 7th Ed 270 The office or employment to which the duty is attached may be private, as in the case of ordinary clerk or public as in that of a Sheriff (*Chambers v Bernasconi* 1 C M & R 347) of a notary public (*Poole v Duns* 1 Bing N C 619), or of a Magistrate (*Wills v Little* and another, 29 L J Ex 267) *Wills v Little* 2nd Ed 180 The duty must have been to record or otherwise report it at the time *Smith v Blakey* *supra*, *Polini v Gray* *supra*, *Doe v Tuford*, 3 B & A 1 890, *Pam v As* 25 L R Ir 184 *The Henry Cozon*, 3 P D 159, *Poole v Duns* (1900) 3 C 388, *Sturla v Niccia* (1880) 3 App C 623 (640) 'This limitation *Prof Wigmore* is a reminiscence of the early history, and is needless *supra*

Duty to a third person—Necessity under this section Under the Indian Evidence Act, the report or record need not be made in the course of a duty to a third person "The statement must relate to a

so far as the question of with the performance of

Whether this fact naturally finds a place in the narrative what is the nature of its connection with the fact the statement of which was a duty and whether this connection was such as to information or observation must however

Field 7th Ed p 98 So in India the following observation was made in *Denham in Chambers v Bernasconi* 3 L J Ex 313-1 C M & R 347 has no application 'We are all of opinion that, whatever effect may be due to an entry made in the course of business any officer reporting facts necessary to the performance of a duty the statement of other circumstances however naturally they might be thought to find place in the narrative, is no proof of those circumstances' A register of marriages kept by Istahad since delivered who celebrated a marriage, and in which register was entered the amount of the dowry, was held to be admissible and relevant as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within section 32, cl (2) *Zakaria v S* 19 C 689=19 I A 159

ordin
the tr

Indian Evidence Act
made at or near the time
in order to

declarations in the course of duty at the time it purp
Similarly in *Poole v Duns* any doubts whether ought to go down to the *Pam v As* 25 L R Ir 184 *Leck v Stark* 36,

not made until two days after the event it was held not contemporaneous. *The Henry Coxon*, 3 P. D 156. But in *Price v. Torrington*, 1 Salk 285 a record in the evening of an act done in the morning was admitted in evidence. The provisions of the Indian Evidence Act contain no similar restriction as to the admissibility of this kind of evidence; but in determining the weight to be allowed to it in particular cases, it will always be important to consider how far the statement or entry was contemporaneous with the fact it relates. *Fild Ev. 7th Ed 95; Can Ev 7enth Ed. 163*

Personal knowledge. The declarations are only evidence of the precise of which consequently he had
In *Brian v. Prece*, 11 M & W
£1 15s for coals alleged to have
been sold by the plaintiff's testator to the defendant. At the trial it appeared

person of the name of *Baldwin* to make entries in the books from what he, *Yem*, told him. Both *Harvey* and *Yem* were dead, but in order to prove the delivery of the coals, *Baldwin* was called as a witness who produced the book, and stated that he made it out from *Yem*'s directions and that every evening he read over
ness for the
There was

not apt
conclud
book
other ca
case w
dictation by another man who is dead, is widely different. As regards the case of *Price v. Lord Torrington*, it is better to adhere to that case as it stands, and

a deceased
at the entries
relate to an act or acts done by the deceased person and not by third parties." There can be no doubt that the general principle of testimonial evidence should

person who had no personal knowledge of the supposed facts recorded. *Every's Executors v. Avery*, 19 Ala 195, *Walling v. Morgan Co*, 126 Ala 326. In the

regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception.

S. 32. Court, *Melville J.* said at p 616 "But the Indian rule of evidence (Evidence Act, section 32 clause 3 and section 31) simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business and although it may be no doubt important to show that the person making or dictating the entries had, or had not a personal knowledge of the facts stated, this is a question which, according to the Indian rule of evidence, affects the relevancy, not the admissibility, of the entries" But in *Jagat Pal Singh v Jageshwar Bahsh Singh*, 25 A 113 P C a genealogical table purporting to have been made by a person since dead, but which was shown to be merely an exhibit binding on him for all purposes, was held to be admissible.

judgment Lord Robertson at a different position. Its alleged truth. But the exhibit in question is Gurdat in a claim made by him proceeding was to make himself this admittedly was untrue. I

His relation to the document is from the personal knowledge and belief of a deceased person upon which that appears the genealogical table in

is admissible in evidence
question might never h
been entirely the worl
this observation of the
of which require "speci
To reject a declaration
would cause great incon

For aught that appears, the genealogical table in

not the entries thus made in the usual course of business of this extensive trading establishment, and as a part of it who prove them not only the best, practicable to secure? We have no hesitations and convenience require them to be admitted. The weighers, wharfingers and numerous subordinates who handled this cotton kept no books. They report to the clerks who keep the books of the concern, and their functions are performed. I remember the multitude of transactions and suppose a different rule upon the commerce and amount to a denial of justice."

Extrinsic proof Extrinsic proof must be given of the death or disability of the declarant. *Duke v Jagadish*, 90 Ind Cis 551, *Charlton v Kaulas*, 41 Ind Cis 422=4 Pat. L. W. 518. It is not enough that the declarant be properly C & P, i.e., here, how received from proper custody, the hand of the one, be presumed (rule & been acted on in the case of declarant.

we have nothing to do in this case : must S. 3
also be proved by extrinsic proof
of acting therein as sufficient , , , *Phy.*
Ex. 379

it is made in writing, there

Any mark or sign that is

North Bank v. Abbot, 13

Pick. 417; Wigmore § 1531.

Cases under clause (2). A mortgage bond purported to be executed by three persons who were all dead at the time of the suit. The signature of each of

statements were proved to have been written by a deceased professional bond-
writer who wrote the whole document in the ordinary course of business. The
two attesting witnesses are also dead and the signature each of them was
satisfactorily proved to be in his handwriting. *Held* that there was sufficient
proof of the execution of the bond, and that the statement in writing of the
deceased bond-writer was relevant under s 32(2) of the Evidence Act. *Haria v.*
Manah Chand, 11 N L R 9=27 Ind Cas 866. In order to prove that a certain
reply to notice had been signed and sent by the 1st defendant, plaintiff's
Kariyasthan was called, who deposed that he was told by the writer of the notice
in question that he wrote it at the request of the 1st defendant. The writer was
made the statement to the plaintiff's
the writer's business. *Held*, that the
the Evidence Act. *Kolonqorath v*

On a trial of a
loading for the purpose
sent from Delhi to C
in Calcutta, advising the despatch of the goods, was tendered in evidence under
section 111 cl 2 of Act I of 1872, but the Court refused to receive it, and intimated
a doubt whether it fell within the instances specified in the section. *Queen v*
Tarnee Charun Dey, 9 B L R App 42 In a suit on a bond, the defendant,

though admissible under section 32 (2) of the Evidence Act, have very little probative value when they are not signed by the transferors and are not supported by the evidence of persons who purport to sign them as witnesses. *My Po Nyein v. Maung My*, 27 Ind Cas 777 = 5 Bur L R 85. A statement made in a deed of conveyance or mortgage deed is not made in the course of business within the meaning of cl (2) of s 32. *Abdulla v Hum Behary*, 14 C L J 467. In a registered deed executed by a deceased person in the ordinary course of business and consisting of an acknowledgment written or signed by him of the receipt of money, is admissible in evidence under s. 32, and not under s 13. *Ahmad Sharif Jamat Ahmad*, A I R 1928 Oudh 218; but see *Abdul Ali v Rejan Ali*, 19 C W N 468 = 21 Ind Cas 618; *Soraj Kumar v Umed Ali*, A I R 1922 Cal 251. Where

ordinary course of business and they are admissible under s. 32, sub-section (2).
Abbas v. Pratul, 65 C. 1070-32 C. W. N. 759-103 Ind. Cas 585-A, I. R.

- S. 32 1928 Cal 448 The entries in *Jama Wasil baki, Jama bandi, Sheya and Kari*: papers or
Nath 47
 lands in
 recited t
 v *Kumu*
 facts of
Melapa v Malayot, A I R 1940 Oudh 97 An endorsement on the cover of a
 registered letter that the
 and had been refused by
 would be admissible evidence if the requirements of those sections are fulfilled *Gobinda v Durlanathi, 20 C L J*
 455 Where it is proved that a village within has been sending weekly
 reports of deaths in the village, an entry in the report as to the death of a person
 on a particular date can be presumed to be correct and can be used as a proof
 of the fact of death at that time
 Crs 883 A statement of a
 not be admissible under s 11

Account Books In a suit by a landlord under section 105, Bengal Tenancy
 Act for settlement of fair and equitable rent the tenants produce account books
 prove that certain holdings had been held
 than 20 years In order to rebut a
 landlord tendered in evidence certain
 lower Court admitted them under s

office in the absence of the tenants and they were uncorroborated
 sufficient ground for refusing to attach any value to the entries in those books
 is evidence *Mon Mohan Roy v Hazi Nath, A I R 1928 Cal 408* see also
Rampyayaba v Balaji Sridhar, 23 B 291-6 Bom L R 50; Durla Nath 16 C L
W N Grant 16 C L J 24-16 Ind Crs 467, Aktau v Taru Nath 16 C L
J 328-1 Ind Crs 266-17 C W N 774, United Ali v Khaja Habibulla, 47 C
266-16 Ind Crs 38-31 C L J 68 The fact that collection papers may be
 admissible under section 34 of the Evidence Act does not prevent them from
 being admissible under section 32 of the Act if the conditions prescribed by
 section 32 are established
 Though an entry in
 tion, no corroboration
Manel Chand v Parakhyo 9 Mys L J 337

Receipts of rent purporting to have been given by the tenants

is genuine is not to be legally presumed in cases where they are
 disputed by the landlord *Kirtibas*
 be expected that a ryot should in
 landlord
 that they
 owner or
 genuine,

Ram Jadu v Laxmi, 211 W. R 241, Mohiuddin, 11 W. R 241, Laxmi v Mohiuddin, 82 Ind Crs 974, Laxmi v Banoo, 12 W R 34, Laxmi v Indra, 12 W R 30; Indra v Golit, 12 W
 shown to be authentic, are

fact evidence of payment of rent, but not conclusive evidence.

v. Kali Prasanna, 26 C 832 (839). But section 95 of the Bengal Road cess Act (IX of 1880) is not exhaustive. It was intended to restrict the operation of s 21 of the Evidence Act, and a road cess return may be admissible in evidence as made the return *Challo Singh v. Gouras Sankar*, 23 W R 192, *Hem A. 177*. The road cess return filed

by a person in his capacity is admissible in evidence in favour of him and may be regarded as a person's statement.

v. Ajodha, 39 C 1005

Swarnamoy v Sourindia, 12 C L J 11-89 Ind Cis 717-A I R 1925 Cal 1189

Deposition of Patwari. A deposition made by a Patwari of a village in Bengal under the Bengal Deposition Act, 1882, is admissible in evidence under s 32 of the Evidence Act. *Man v Duarka Prasad*, 9 Pat. L T 679-109 Ind Cis 136-A I R 1928 Pat 129

clause See illustration of the

CLAUSE III

Scope of clause (3) This clause makes declarations against interest admissible in evidence. Illustrations (e) and (f) apply to this clause. This section makes three classes of declarations against interest admissible in evidence, namely, 1st, where they affect the declarant's pecuniary interest, 2ndly his proprietary interest, and 3rdly his interest in office or in a public position.

admissible against the interest of the person through whom he claims. *Rani v Khagendra*, 31 C 871 P C-9 C W N 71. Under this clause the tests of admissibility of statements against interest made by deceased persons are that (1) the deceased must have had personal knowledge of the facts he was stating, (2) the facts stated should have been to the immediate prejudice of the deceased, (3) the statements must have been, to the knowledge of the deceased contrary to his interest, and (4) the interest must be either pecuniary or proprietary. *Ramanathan v Murugappa*, 33 Ind Cis 969-3 L W 216-(1916) 1 M W N. 208

English law According to English law declarations against interest are statements made by deceased persons adverse to their pecuniary or proprietary interest; and the guarantee of their credibility consists in the fact that they are statements made by a person who would not make them if they were not true, since it is the general experience of mankind that persons do not make statements adverse to their interest unless they are likely to be true. *Middleton v Milton*, 11 C 63, 67, *Brady v Atkinson*, (1879) 13 Ch D 101. The interest in other sense as for instance an interest in office or in a public position.

32. *v. Exeter*, (1869) 4 Q. B. 311, *Hayes* I observed: "Having regard to the great changes that have in recent times, been made in admitting the evidence of interested witnesses, when alive, it would be most objectionable to lay down any narrow restrictions upon the reception of declarations in any way against interest which have been made by persons since deceased, and which are frequently the only evidence that can be obtained on the subjects to which they refer and where the Courts are frequently obliged to supply the want of evidence by presumptions."

In *Taylor v. Witham*, 3 Ch. D. 11, no doubt an established rule is again at the interest of the man who is dead for all purposes. What is I adopt the view of *Baron Parke* in *C. 333*, that it must be *prima facie*

speaker is admissible even if upon the facts and other circumstances, it may be

making it and "not an admission which may or may not turn out at some subsequent time to have been against his interest." See also *Smith v. Blake*, L. R. 2 Q. B. 326, *Marssey*.

In *Tucker v. Olcott*, 1008, Lord Justice that the statement in this state Court of Appeal

Company, (191 sought to be put related to an acknowledgment of paternity and a promise made by the deceased to marry the mother of the child, who claimed compensation under the "Workman's Compensation Act," as a dependant on the deceased. Lord Justice Hamilton, after making an incidental observation that as between the dicta of *Blackburn J.* in *Smith v. Blackley*, 2 Q. B. 826-26 L. J. Q. B. 14, that the statement must be one which never could be made available for the person himself, and that of *Jessel M. R.* that it is sufficient that the statement is *prima facie* against the interest of the person making it, he is inclined to the former view, "if there is any real difference between them," proceeds to lay down categorically the tests of admissibility of statements against interest. According to the learned Lord Justice, (a) the deceased must have had personal knowledge of the facts he was stating, (b) the fact should have been to the deceased's immediate prejudice, (c) the statement must have been to the knowledge of the deceased, contrary to his interest, and (d), the interest must be either pecuniary or proprietary. The case went up to the House of Lords. Lords *Forchurn* and *Moulton* on neither accepted the statement of the law. to agree. A. C. this point ground.

time when she was not of sound mind, memory or understanding. Under which had been destroyed her husband took a life interest in her estate after as under an ante nuptial settlement he was, in the events that had happened.

entitled absolutely to her estate. A statement by the husband, who had died before the suit was brought, mind when she destroyed sound S.
disparagement of his own ing in
T. L. R. 202. ills, 27

departure from English
h would subject the declar-
ant. This seems to be the
Case, 11 C & F 108 In
that case the question was whether A was lawfully married to B A statement

injuriously affect the interest of the party making them Nor it is true, that
s to certain
These are
in that case
be liable to
prosecution, that, therefore, the instant the grave closes over him, all that was
said by him is to be taken as evidence in every action and prosecution against
another person, is one of the most monstrous and untenable propositions that
can be advanced." *Nort Ev* 184 So "the interest involved must, according to
the English Law, be one of a pecuniary or proprietary nature, no other interest
will suffice But the Indian Law, as laid down in sub section (3) of section 32 of
the Evidence Act, extends the scope of this exception and put a penal interest
on the same footing as a pecuniary or proprietary interest. *Per Shadi Lal C J*
in *Mahomed v Emperor*, A I R 1926 Lab 54-89 Ind Cas 252 (258) So a
statement which would have exposed the declarant to a criminal prosecution or
to a suit for damages, would be admissible as a piece of evidence in any proceed-
ing in which such evidence is relevant to the issue or issues being tried in such
proceeding *Per Ffoides J* in *Mohammad v Emperor*, 89 Ind Cas 252 (254)

Principle The exception presupposes, like most of the others, first a neces-

untruthfully. *Wigmore* § 1455 ely to have been stated

impo
being
unavailable, his statement sho
his case being regarded as
must show that a particular fac
as here applied, signifies the
the same source, the declarant
per the witness is practically

Manley v Curtis, 1 Price 229, *Phillips v*
Cole, 10 A & E 106, *Barrows v White* 4 B & C 328, *Sjargo v Brown*, 9
B & C 936 In *Fitch v Chapman*, 10 Conn 11, *Williams J* said The cases
where such evidence is admitted seem to proceed generally upon the principle
that, by the
principle of
insanity
from jury
evidence
incompetency.

S. 32 *v Blad's*, 3 Camp 458, the declarant had suffered from an apoplectic fit and was declared by his physician to be in extremis. The question was whether the declaration of such a person
Tilkenborough L C J said
 and I am afraid to establish
 patient is not all
 permitted there
 this section of the
 the declarant is -
 procured without an amount of delay or expense, which under the circumstances
 appears to be unreasonable *Asiatic Steam N Co v Bengal Coal*, 30 C 701

of evidence is
 covered by the
 admissibility when
 since could not be

Subjective relevancy—Adequate knowledge In connection with the
 with the other exceptions to the hearsay rule, judicial attention is concentrated
 upon the subjective relevancy shown by the declarant. Here is elsewhere the
 elements of such subjective relevancy are two, Adequate knowledge and Absence
 of controlling Motive to Misrepresent

Adequate knowledge may co-
 curate with the inference or state
 sufficient, in the opinion of the pres-
 ent, in acting in accordance with
 extent on the part of the declarant must be shown in order to warrant
 reception of a declaration against interest as secondary evidence of the facts
 asserted. It is not regarded as sufficient, for example, to show that such an
 extra-judicial statement was found, after his decease, among the papers of the
 person purporting to be the declarant. He must be affirmatively shown to have
 made the statement and it must also appear that he knew what he was talking
 about *Chamberlayne's Ex* § 2772

Circumstantial Guarantee or Absence of controlling Motive to Misrepresent
 The basis of this exception is the principle of experience that a statement
 asserting a fact distinctly against one's interest is entirely unlikely to be
 deliberately false or heedlessly incorrect, and is thus sufficiently sanctioned
 though oath and cross-examination are wanting. In *Smith v Blagden* L R
 Q B 326, *Blackburn J* said: "When the entries are against the pecuniary interest
 of the person making them, they are not likely to be made available for the purpose
 himself there is suc-
 admitted after the
Talor & L R are,
 statement appears
 which after the death
Meier's Adm'r v
 taught us that when one makes a declaration in disparagement of his
 or interests it is generally true, and because it is so the law has deemed it
 the exception to the
 likely to make a false
 posed to be the fact
 when a person, who
 making a declaration prejudicial to his own interest says something which is
 cessat ipso facto. Per Sir John
 Lath 54-89 Ind Cts 303 was
 446-57 I A 14 (P C) = 34 C 11
 1910, 1 K B 31

making a declaration prejudicial to his own interest says something which is
 cessat ipso facto. Per Sir John
 Lath 54-89 Ind Cts 303 was
 446-57 I A 14 (P C) = 34 C 11
 1910, 1 K B 31

Origin of the rule In *John Bunbury* 16 (1719) rentals or
 wed at Winchester and Dorchester
v Brock, 3 Woodeson's Lectures
 it is said: "On a similar principle
 evidence, because the habit or custom
Roe & Brun v Pauling, 1 H. & C.
 'The contents of the will and his
 possession of it, it diminishes his
 interest in the fine on renewal, in the same proportion as it raises the rule to be

reserved. The paper was written by a confidential agent at least, though it does not appear that he was the immediate steward of the estate at the time, but

in evidence the following entries from the day book and receiver or a man and wife who had attended the mother of William Fowden junior at his birth, and was since deceased —

Day Book Entries

' 22nd April, 1768.

38* Richard Fallows's wife Bramhall Filus circa hor 9 mututu cum forcipe, etc

paid †

Then followed in the same page the entry in question without any intervening date —

' Wm Fowden junr's † wife, 79 †

Filus circa hor 3 post merid nat etc

Ledger Entry

' Wm Fowden junr, 1768

Aprilis 22 Filus natus, etc

Wife

26th Haustus purg

£	s	d
1	6	1
0	15	0
<hr/>		
2	1	1

Pd 25th Oct, 1768"

These entries were tendered in evidence to show the precise day or time birth of Wm Fowden, jun. The evidence was objected to. But the jury found on this evidence that Wm Fowden, jun. was not born on the 2nd but on the 22nd April should would

been established for the security of life, liberty and property but in declaring our opinion upon inadmissibility of the evidence in question we shall lay down is limits Warren ks of a making ve been entries?

I think the evidence here was properly admitted, upon the broad principle on which receiver's books have been admitted namely that the entry

* The figure 38 referred to the ledger

† This was the designation at the time of the father of Wm Fowden jun in question

‡ These figures referred to the ledger the entry in which follows

32.

in his own handwriting repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears. Therefore the entry made by the party was to his own immediate prejudice when he had not only no interest to make it if it were not true, but he had an interest the other way, not to discharge a claim which it appears from the other evidence that he had.

beginning with *Warren v* 279, in that if a person's declaration of that fact, at his death, if he could!

Ibid. But in *Gleadow v* expression reported to be is 'if he could have been not introduced in any way such qualification and I have great doubts whether I ever used the expression. If I did, *Scorie v. Lord Barrington* and *Bosworth v Colclitt*, decided in the House of Lords, are against it" *Player Cas* 487.

Statements against pecuniary interest. Statement of a fact against pecuniary interest when its tendency is to take away or lessen the pecuniary interest.

may include both verbal or written ones, documentary evidence, and particularly in books of account. Where the books of collectors of taxes, stewards, bailiffs, or receivers subject to the inspection of others, and in which the first entry is generally of money received, within the principle of this rule. *Kington 3 Brod & Bing* 13; *Leaton, 4 T R* 669; *Short v Leaton*, 4 T R 669; *Dean v Caldecott* 7 Burd 556; *Dean v Caldecott* 7 Burd 556; *Marks v Lacey*, 3 Bing N C 408; *Wynns v Pyrahall*, 7 B & Ald 570. *De Rutca v Farr*, 4 Al & El 53, *Plaxton v. Dare*, 10 B & C 17. But it has been extended still further, to include entries in private books also, though retained in

is not sufficient attempted to be proved of his deceased in this exception *Green v. \$ 150, Rudgway, 10 East. 109; Middleton v. a mere memorandum of in agreement* S. 3

nor were they made in the course of his duty or employment *R. v. North, 4 Q. B. 132* In general, the interest or burden involved in the fact stated must be a positive one and of the declarant (

A given fact may circumstances; for example, that one is a partner may or may not be against his interest according to the state of the firm's assets *Raines v. Raines, 30 All. 128, Humes v. O'Bryan, 74 All. 428* In the last named case A brought a suit against X and Y as partners Y having died, the suit was pressed against X alone X denied his partnership with Y and to prove his case offered declarations made by Y to the effect that he (X) was not a partner It appeared that the

Y made these declarations to be noticed, the absence of that Humes at his interest

this is so because, if true, it would entitle, Humes to a half interest in the partnership assets The assertion, therefore, that Humes was not a partner, having been made at a time when the partnership business had failed, was a declaration exonerating him from a pecuniary liability for the partnership debts, and, if true, to this extent doubled the ultimate amount of Glover's (Y's) liability So it is clear that whether a statement is against interest or not depends upon circumstances A statement by Y that X is not a partner is not against the interest of Y when the firm is solvent, but it is so when the firm is insolvent.

of money received by him on behalf of his *cestui que trust*, and for which he was liable, held admissible against the *cestui que trust* *Bright v. Legerton, 29 L. J. Ch. 802* In an action by a statement by the testator debt is admissible *Watson* testator are evidence against a traitor *Smith v. Smith, 7 Car. & P. 401* In an action of trover to recover a watch, the defendant pleaded that it was not the property of the plaintiff It appeared that the watch had formerly been the property of the father of the plain-

S 32. made it is not sufficient that it might possibly turn out afterwards to have been against his interest *Thurds Ex parte*, 14 Q B D 415

Against Proprietary interest An equal guarantee of trustworthiness furnished when the extrajudicial statement is opposed to the proprietary interest of the declarant. By declaration against proprietary interest we mean a

in the property. The principle on which these declarations are received in the presumption of absolute ownership arising from possession. When a party in possession of land claims that he holds a less estate than a fee simple, for instance, that he is tenant in tail for life for a term of years, or that he manifestly cuts down his own interest in title, and it is not likely that a man interested than he claimed or stated. *Nort 192, Peaceable v Watson & Taunt 16 R v Exeter (1869) L R 4 B 341, Gauld v Miles 27 L R v Birmingham Blackburn J said* 'It is now well settled that a statement against interest by a deceased person is admissible with certain limitations and evidence in proceedings between show that where a person prima facie evidence of a tenant down that interest is admissible against his interest.' Similar declaration of the deceased father of the claimant who had been in the possession of the property that he only occupied and managed it for his son was held admissible as being against the interest of the person making it. *A declares on interest in the land whatever is shown by Redman 1 Q B D 11* that a person in possession of land is the owner thereof for the purpose of the rule therefore.

Ibid, see *Wills Ev 193 Welsh v Munwood 7 T R 397* The rule therefore is the same.

to treating declarations

a question of public right was in issue, the declaration of a deceased land made whilst planting a tree stating that he planted it to show the boundary of road is not evidence of public right, for it is not a statement of general reputation but of a particular fact. *R v Bliss 7 Add & E 560 Cf Selby v Chadwick 2 Moo & Rob 507* Assertions that one's estate is a leasehold or not a freehold or that one's possession is merely as agent or as trustee for another are admissible. *Walker v Broadstock 1 Esp 458 Doe v Hutton 1 Esp 4 Doe v Jones 1 Camp 367, Peaceable v Watson 1 Taunt 16 Nicol 1 Bing N C 430, Doe v Longfield, 16 M & W 513* A declaration by the person in possession, that his interest was less than a fee simple for his own life only, would be primary evidence that it ceased to exist at his death. *Doe v Welsh v Longfield, 16 M & W 497* To make a declaration against proprietary interest in lands evidence after the death of the declarant have been at the time in actual possession. *La Touche v Hutton, 1 R 9 B 166* A declaration or a written entry by a deceased person when occupied that he was tenant at so much rent and had paid it, is admissible as evidence against proprietary interest to prove the fact of the payment. *Rex v Exeter Guardian, 10 B & E 133* Declaration of a

deceased person, claiming a limited interest under a particular Will of property of which he was in possession, are admissible to prove the fact that the Will had a legal existence, and certain persons were named executors therein *Sty v Dedge*, 19 L. J. P. 63. On an issue as to the right of L. to a fishery, entries of a deceased receiver charging himself with the receipt of rent from a sub receiver, due from the fishery, are admissible in evidence. *L. J. Ex. 1.* Entries made by a receiver of a fishery, are admissible in evidence. *Sty v Dedge*, 19 L. J. P. 63. On an issue as to the right of L. to a fishery, entries of a deceased receiver charging himself with the receipt of rent from a sub receiver, due from the fishery, are admissible in evidence. *L. J. Ex. 1.*

On a pecuniary penalty, by way of imprisonment. *Coché le Cas* decided, in 1844, was neither a precedent, nor a backward

without bias was received
1476 So it is plain

testimony to such an admission if oral. This is the ancient rusty weapon that of procuring fabricated

a very strong tendency to make any one out side of a Court of Justice believe
L. J. A.—71

S. 32.

the admissibility of such a confession; the of the two countries do not bind us; case of declarations against interest as well against interest as a confession of murder than dying declarations, which would l

one that there is no
which declarations
is not being against
the declaration to a

against his pecuniary or proprietary interest. *Not L v 184* But in order to make such statement admissible in evidence, the fact stated in the statement must expose him, to a criminal prosecution or to a suit for damages, at the time it was made. *Stoke's Anglo. Ind. Code Vol II. 874*; see also *Nicholas v Aljar*

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P. L. R. 1

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exposed herself to

Emperor, 10 N. L. R. 30-56

Ind. Cas 582-21

Cr L J. 480

Statements of sundry facts against interest. There are many facts which in their ultimate effect be against the proprietary or pecuniary interest, though in their immediate and narrow aspect there may be no such clear character. These facts, however, may never the less be facts so decidedly against interest that no one would be inclined falsely to concede their existence. If so, on the general principle they should therefore be admitted. No more precise

state the terms of the contract with B, was rejected. *Blackburn v Lye* is no more than an admission that he has the care of the three chests which arrived at the office and the possibility that this statement might make him

show the existence of the Will. In *Flood v Russel, 29 L. R. 1ra.*

high she profited
Wyn, (1914) A
 claimant was a
 the deceased's
 son *Loreborn*
 ng a legal
Wigmore

§ 1461. In *R. v. Worth*, 4 Q B 131 an entry of a hiring at a certain wages in the deceased master's private book with a memorandum of payment, was held

to pay conditionally = none the
 subject to some conditions imposed
 contract liability of any sort is on
 § 1461

fact is
 of a
Wigmore

of merely the
 is because the
 likely to be
 create a liability

Preponderance of interest—Credit and debit side—No motive to misrepresent In some cases it has been stated on the analogy of other Hearsay exceptions that there must be no motive to misrepresent and this has been put as an additional requirement *Gladwin v. Atkins*, 3 Tyrw 301; *Marks v. Lahee*, 8 Bing N C 403 "But" says *Prof Wigmore* "there is no such additional requirement The real or not uncommon situation, interest, there is also a

increasing of the entry standing alone must be against the interest of the man who made it Of course, if you can prove *ab initio* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet it was for

account in which the receipts creating liability are on the whole exceeded by the payments or credits in his favour When, in the

principle, any reference to collateral records which amounts to a repetition or an incorporation of them would make them a part of the admissible statement." Entries made at a subsequent occasion, when the original entries are complete, are clearly excluded. *Doe v Tyler*, 4 Moo & P 381, *Knight v Waterford* 4 Y & C Ex R. 283 (294).

In *Reg v Overseer of Birmingham*, 1 H & S 763—31 L J M C 63, *Cockburn J* observed "I should be prepared to say, that as soon as it is established, which it now is on the authority of *Higham v Ridgway*, *supra*, and the other cases, that you may receive the declaration of the deceased person as showing, not only something adverse to his interest, but all incidental facts contained in that declaration, so far as they are not foreign to it, it follows as a consequence that those collateral facts may be proved by the declaration." In *Davies v Humphreys*, 6 M & W 153 *Parke J* (afterwards *Baron Parke*) said "The entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the

record to therein provided that the

a variety of circumstances. If the statement happens to be recorded in a docu

it came to be
making it or an
implicity in the

It is now, however, well settled that declarations of deceased persons against their interest

so much contained in the facts stated in them, as

to the declarations, and may be taken to have formed a substantial part of them

see per *Cockburn*

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admissible. *Sitaram v Akubal* 5 Pat 168=91 Ind Cas 13=7 Pat L 7
573=A I R 1926 Pat. 255 But disconnected facts though contained in the
same document or statement are inadmissible. *Doe v Betts* *supra* *Knight v*
Waterford, 4 Y & C 293, *Angama v Bharmajpa*, 23 B 63

When the statement must be against interest The fact stated must of

early engrafted upon the rule, viz. that an admission of a fact, made by a
deceased person which is against the interest of a party making it at the time, is
evidence of that fact as between third persons. See also *Percival v Hanson*,

3. 32. 7 Ex 1, per *Parle B*; *Lalor v Lalor*, 4 L R 681; *Ex parte Elcock & Tollemache*, 14 Q B D 115; 416, *Smith v Blakey*, L R 2 Q B 326, *McGill Allen*, 13 Ch D 326. The chief application of this rule was to the endorsement of payment on bonds or notes before the claim was time-barred. The creditor's receipt of payment, in part or in whole, was a fact against interest, hence his memorandum endorsing upon the instrument the fact of receipt of payment would be a statement of fact against interest, the fact of payment thus evidenced, would be by implication an acknowledgment (of a promise) by the debtor, and thus would at common law suffice to give a new beginning to the period of the statute of limitations. *Wigmore* § 1466, *Seele v Lord Barrington*, C J in *Addan* a motive for unimpaired.

made after the Statute had run was not evidence, and that the note was barred by the Statute. See also *Turner v Crisp*, 2 Str 827; *Glyn v Bank of England*, 2 Ves 43; *Short v Lee*, 2 J & W 488, *Gleadow v. Atkins*, 3 Tyrwh 601, *Neubold v Smith*, 29 Ch D 277.

When the declarant to be prosecuted, and so the sub section (3) were not clause 3 of section 32. *Nga To v King Emperor*, 7 L B R 33=20 Ind 90=14 Cr L J 510.

Statements begun in question stated to be judge Jur N t stances t admissibility of evidence. *Phip Ev 271*

Spontaneity not required. No administrative necessity has been put forward for requiring another general safeguard against mistake in or manufacture of evidence, i.e., guarantee of spontaneity should also be present, if a statement against interest is to be received. *Doe v Twiford*, 3 B & Ad 890, *Chamberlain*, L J § 2773.

31 L J M C 63. *Feulen v Thomson*, 13 Ch D 293. *Farmingham*, 11 T

in the cases. See also *Jagnot v Hay*.

Eseler v Warren, [1911] 1 K B 190-191. in whose-ever has been called in the latter case it is not necessary to call

Contemporaneity of entry Declarations against interest are admissible even when they are not made contemporaneously with the facts *Doe v Tuford*, 3 B & Ad 890, *Smith v Blakey*, L R 11 Q B 326, *Whaley v Masserene* 8 Ir Jur N S 281

Personal Knowledge The qualifications of the declarant with reference to the facts as those of the ordinary witness *v Nanson* 7 Ex 1, *Tay* § 669, is held that it was not necessary knowledge of the fact stated—that if the entry charged himself, the whole of it became admissible against all weight, and not *magna*, 1 B 610 is applicable to the facts by no means uniform *Vide Doe v Robson*, 15 East 31, *Short v Lee* 2 Jac & W 488, *Barker v Bay*, 3 Russ 76, *Uddleton v Melton* 10 B & C 317 *Lloyd v Pouell* (1913) 2 K B 133, 137 C A *Gleadow v Allin* 3 Tyrw 302, *Marks v Lakee* 3 Bing N C 420, *Percival v Nanson* 7 Ex 1 In the above cases it was held that the declarant must be shown to have had a competent if not a peculiar knowledge of the matter of the declaration *Tay* §

of what the chest contained. Similarly in *Doe v Longfield* 16 M & W 514 the assertion of an estate by life interest only was regarded as ambiguous and inadmissible See also *Plaxton v Dare*, 10 B & C 19, *Doe v Barton* 9 C & P 254

Extrinsic Proof Extrinsic proof must be given of the declarant's death (unless it is presumed) necessitate the admission be shown to have been made by the declarant *Short v Lee*, 2 Jac & W 467, *Plumer M R said* In all these cases (of books written by bailiffs etc) the first wrote them, if you fail in that *Phip Ev 7th Ed* 272, s *Curtis* 1 Price 228, *Bullen* 1 D 58, *Doe v Deviss* 7 C

authorised or adopted by the deceased *Lancum v Lovell* 6 C & P 437 *Bradley v Jones*, 13 C B 822, *Doe v Hawkins* 2 Q B 812, *Re Lountaine* (1909) 2 Ch 382, *Phip Ev 7th Ed* 272 Where, however, the document is thirty years old

or receiver of another, it is necessary, in addition to give some proof that he really occupied an alleged position, except (1) where the agency is a public one, or (2) perhaps where the entries are ancient produced from proper custody and bear strong internal evidence of genuineness *Tay* § 663 *Phip Ev* 311

Declarations against interest and Admissions, distinguished. Declarations against interest received and contrary, are of the deceased declarant, admitted as an exception to the hearsay rule *Maclicys L* 316 Such declarations are made, being compelled by truth, and as such they are trustworthy as if made on the stand under oath and cross-examination *Higmore* § 1170 The points of essential difference in main are

32. four (1) The admission is a creature of procedure, the declaration of interest is entirely a matter of evidence, & of reasoning (2) Adm: is a primary evidence of the facts stated, the declaration against interest is a secondary grade of proof, received only when shown to be necessary to the case of the proponent, the primary evidence being unavailable (3) The admission is receivable in evidence only when the declarant or some one identified with him has a legal interest is a party to the suit and the admission is offered against him in a declaration against interest may be made by any one, and is receivable in evidence between third persons and though made in favour of the present proponent or one in privity with the declarant. (4) The admission is received with the declaration against interest being offered.

to his peculiar
distinction
cause confusion

Declarations held admissible under this clause At the trial of an action for an injunction for stopping up ancient lights it was proved that there was a covenant made by the defendant for the use of light and that the agent of the owner of the alleged dominant tenement the sum of £ x pence a year made a verbal statement that it was for the lights of the house The agent was now dead Held, that this was evidence of payment of the rent by the owner of the alleged dominant tenement Beale v Gilson, 49 L J Ch 133 13 C D 283 Where there is a right of entry given for an assigning or under a lease if a person gains a fact in favour

The entries in the account from being admissible as evidence in the case of *Whaley v. Carlisle* 17 Ir C L R 792. An entry by a deceased person who was not a party to the account, and in which the deceased person was not a party to the account, is admissible in evidence, even though the party to the account is not a party to the account, as in the case of *Lee, 2 Jac & Walk 489*. In an action by executors against a son of the deceased to recover money received by him from his father, the debtor's side of the account book containing the receipt of interest from the son, was held to be admissible in support of the plaintiff's contention that the money had been received and not given although the right of the plaintiff without consent to put in the other side, which contained no entries opposed to the advantage of the plaintiff, was doubtful. *Peck v. Peck* 21 L T 670. L now dead, was a clerk to the plaintiff. A book containing entries in the handwriting of L which charged E with receipt of interest on a sum owing by R and W to the plaintiff was offered in evidence. —*Hell*, that evidence could be given of E's so doing, as of parcel in the presentation made by him against his interest. *Kettlewell v. Watson*, 20 W L R 402. Entries of charges made by an attorney in his books showing the charges when a certain lease was prepared for a client of his was executed which the lease was executed under a power to lease in possession, and not in reversion. *Doe v. Robson* 15 East 29. A deceased solicitor's books are evidence in an action for charges himself therein with receipts on his client's behalf as of party to the account, but not as to interests whether or not the entries were made in the ordinary course of business. To prove that the entries were made in the ordinary course of business, it is necessary to show that the entries were made in the ordinary course of business.

though on a full investigation of all the facts the declaration of a life interest in the property not to have been detrimental to interest The declaration of a life interest in the property to the effect that he had destroyed a Will which gave him a life interest in the property free hold arising from examination of the property.

to his advantage, because apart from the existence of a Will, he in fact took no interest in the property. *Re Adams, Benton v Pouch*, (1923) P 240=127 L T. S.

within the meaning of s 32, Evidence Act and are hence inadmissible *Jagdish v Harihar*, 78 Ind Cas 219=10 C L J 39 On the death of a member of a joint Hindu family the other members sued the widow of the deceased for possession of certain properties on the ground that she had no right to them, her husband having died an undivided member The widow set up a division and relied *inter alia*, on a mortgage executed by her deceased husband and attested by the plaintiffs containing possession of the properties acknowledgment that they had

admissible in evidence as a statement against interest under s 32 of the Evidence Act *Gnanamuthu v Veilu Kanda*, 19 L W 491=79 Ind Cas 3=A I R 1924 the circumstances with the adoption under s 32 (3)

of the Evidence Act *Danopati v Balsundara*, 36 M 19=18 Ind Cas 989 The *varaspatra* in this case was admissible not only under section 32, clause (3) of the Indian Evidence Act as a declaration made by the widow against her proprietary interest, but also by reason of s 90 of the Act *Hari Chintaman v Moro Lakshman*, 11 B 89 Recitals in deeds in favour of one party to suit showing nature of some lands are admissible not only under this clause but also under s 13 (b) *Tikaram v Motilal*, A I R 1930 All 299 In a suit for account by the representatives of A, deceased, evidence was adduced of a document

his interest *Zaynub v Hadjee*, 2 Ind Jur N S 51 Where the question, whether there was partition between the ancestors of the parties or not, is in issue, the statements made by the deceased ancestors of the parties that there was partition are admissible in evidence as they are statements against proprietary interest of the persons making them *Jairam v Narottam*, A I R 1929 Nag 131

gift in a case covered by s 32. *Appasami v Rama Tejar* 31 L W. 776=61 M. I L A -72

32. L J 881. A statement of a convicted person made about the time of his being hanged that the approver in the case was not involved in the crime may be admissible *Shafi v. Emperor*, A. I. R. 1930 Nag 259=124 Ind Crs 409. Statement in adoption deed that adopter's sons were suffering from leprosy is admissible to decide validity of adoption and attestation by sons being against their interest is admissible *Nangammal v. Sankarappa*, A. I. R. 1931 Mad 100. Vendors in sale deeds belong to them, but not land *Tula Ram v. Maitra*, A. I. R. 1930 All. 299; but see *Aligun Nayahars v. Perumal*, 39 L W 472.

Declarations held not admissible under this clause. An admission made by a bankrupt in his statement of affairs that a debt is due from him, is not after his death, admission of the existence of the debt after paying the debt. 13 Q B D 720.

Evidence, either on the general ground of pecuniary interest, or on the ground of the audit having been made in the ordinary course of business. *Wheat v. Moot*, 45 L T 1. Business done by a creditor account, merely because the account is by a firm of the trader acknowledged on the part of the person by whom it was made. *Whaley v. Whaley*, 10 Q B D 100. A statement made by a person in the ordinary course of business is admissible if it is made in the ordinary course of business. *Whaley v. Whaley*, 10 Q B D 100.

The statement of a person in the ordinary course of business is admissible if it is made in the ordinary course of business.

427=102 Ind Crs. 145=A. I. R. 1907 No. 133. Statements of persons under s. 32, Evidence Act, conditions specified therein are for a certain person a statement in the more than 20 years before is not admissible under s. 32. *Shafi v. Emperor*, 124 Ind Crs 409. Hindu wife is admissible in interest.

Long enjoyment of her husband's property. *Dalbhadur v. Lajoy*, 10 C W N 300=A. I. R. 1930 P. C. 50. *Shafi v. Emperor*, 124 Ind Crs 409. A. I. R. 1930 P. C. 50. *Shafi v. Emperor*, 124 Ind Crs 409.

Held, that neither the statement of a person in the ordinary course of business is admissible if it is made in the ordinary course of business.

as the statements in the Will made by the deceased that he had spent a particular S.

plaintiff, a statement

The evidence of
Act would be ad

rietary interest of the deponent, even in the
of title *Shyamanand v Rama Kanta*, 32

Will of the purchaser of the title
title *Held* that the recital of *brahmav* title in the Will was not admissible
Satindra v Krishna Kumari 36 Ind Cas 682 A statement by a plaintiff as a
witness to the effect that her father told her that he had mortgaged the land in
suit to the defendant is inadmissible under this section *Mt Nga Ma v Nga*
Lalab, 29 Ind Cas 607 = U B R (1915) 1st Qr 50 A recital in a conveyance

not admissible in evidence under this clause. *Harihar v Guwagranth*, 128 Ind
Cas 791 = A I R 1930 P C. 610

Statement as regards boundray In *Rajah Leclanund v Mt Lakhaputee*,
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proprietary interest *Karuppanna v Hanja Suami*, 107 Ind Cas 293 = A I R 1928

THE INDIAN EVIDENCE ACT

- S. 32. It is unnecessary to cite any *v. Radgway*, 2 Sm L. C 307 under the cases the
- This case *na v Bharmappa*, 23 B 63, which again was followed in the High Court in case of *Haji Bibi v. H H Sur Sultan Mahal* 11 Bom L R 409=2 Ind Cas 817, and in our Court *Kunj Behury Lal*, 16 C W 116=25 C I, 116 in Allahabad in all these cases *Sudhari Pandey*, 1 case of *Ambar Ali* 116=25 C I, 116

in the case of *Radha Krishna v Sarbeswar Nag*, A I R Cal 681 and in the case of *Choom Lal v Nilmadhab*, A I R 1925 Cal the question of admissibility of such a document under s 32 of the Evidence Act has not at all been considered. See also 44 C L J 587=99 Ind Cas 910=A I R 53 Ind Cas 863, *Trimbal v Ganesh*, 68 Ir

in the mahal, in which there was then zemindar many years prior to the question that the original receipt was then zemindar relied upon a statement

possible." It is clear that the view is consonant with the principle underlying the trustworthiness of *Couch C J* and *Auslie J* said "We are Judge that this statement was not ad which the interest in the matter is against it is against cut down the p

mount of the original receipt a document of this kind is, and the part which is which is against his interest

interest of the proprietor, taking the document

favour. In the circumstances there was nothing to impeach the judgment of Mr. 63 and
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and Cis 752,
 any reason
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 in evidence

land then conveyed was limited by certain boundaries, was an admission that
 their proprietary interest did not extend over any land outside the boundaries
 mentioned. The entire statement was consequently inadmissible (*Higham v*
Ridgway, 10 East 109, *Connar v F*
Nanson, L R 2 Q B 326, and *R v Eze*
 is that the statement is accepted, not

interest of the person
 impose boundaries may
 how a statement of

that nature can be said to be against the proprietary interest of the person
 making it, is some what difficult to ascertain. This view is supported by
 the following observation of Sir Richard Garth in *Brojesuar v Budhanudhi*,
 6 C 268, where the learned Chief Justice observed 'A recital in a deed or
 other instruments is in some cases conclusive, and in all cases evidence as
 against the parties who make it. But it is no more evidence as against third
 persons than any other statement would be.' See also *Brojomohan v Gaya*
Prosad, 30 C W N 761, *Choon v Aulmadhab*, 41 C L J 374, *Radha v Sorbe*
suar, 20 C W N 469

death as a statement against his proprietary interest. *Wills Ex* 192 And a
fortiori if it shows that he has no interest in the land whatever. *Ibid* This is
 based on the well known rule of law, that a person in possession of land is
 presumed, until the contrary appears, to be the owner thereof in fee simple.
Grey v Reiman, 1
 therefore is not
 the land occupied
 against his interest to deny his possession of one close than it is to assert his

the subject matter of the document cannot be regarded as having been against
 the pecuniary or proprietary interest of the person making it within the meaning

S. 32 of section 32(3) of the Evidence Act and is consequently inadmissible in *Kumil Kumari v. Dilsool Roy* 101 Ind Cas 512-15 C. L. J. 53
Dandajani In re 8 Ind Cas 968, *contra Lahu Singh v. Sahaleo Singh* 30 Ind Cas 610

CLAUSE IV

exposing them to constant contradiction *Pup Do 7th Ev 280*

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 to have had a personal knowledge of the facts, and to have stood quite independent
 ed are received in evidence In case of general rights, which depend

declarations are admissible in *the Berkeley Peerage Case*, 4 C. L. J. 103
 deceased persons who are entitled to

intervals of time, direct proof of their existence therefore only required

Administrative requirements Necessity Before secondary evidence unsworn statements can be received as proof of the fact asserted it is essential here as in other instances of the use of secondary evidence that the proof of the oral testimony of the declarant should be shown to be unsworn and that in consequence, a sufficient administrative necessity to produce secondary evidence has been placed on the proponent A declaration of the nature is said to be admissible, 'where no better evidence can be had' *Of the Law* Ev § 2791

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sanction or test, deemed equivalent for ascertaining the truth of the statements

in a manner the purpose of cross examination After it is reasonably safe to accept the result as an established fact
 H. 1910 5 1583 So the guarantee of its credibility consists in the

of a large number of persons, all interested in and therefore likely to ascertain the truth of an opinion which if untrue, would be surely challenged. *Hill v 2nd Ed 222; Wright v Doc, 7 A & E 313 in H L 1 Bing N C 489; R v Bedfordshire, 4 E & B 535.*

Origin of the Rule "At the time of the definite emergence of the Hearsay rule—that is, by the end of the 1600's there remained in existence a practice more or less loose, of receiving the reports of the common people as evidence of fact. The jury could in any case have considered, had they otherwise known of it, would be unnatural and improbable. But with the final shaping of the Hearsay rule's limits, and the conscious statement of specific exceptions, in the first half of 1700's and with the progress and final doctrine that the jury could consider evidence in Court, the use of common

by the

Subjective Relevancy—Adequate knowledge. Unless the situation presented to a presiding judge is such that knowledge on the part of a given declarant as

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Barrel, C M
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that from their situation they probably were conversant with the matter of which they were speaking" *Bow v Allensdown, 34 N H, 351, 366* When however, the circumstances show that the declaration is made otherwise than upon the declarant's own knowledge it will, even when relating to a public right, be inadmissible (*Devonshire v Neill supra*) *Plap Ev 286*

Scope of the Section "Evidence is to be admitted from old persons . . . of what they have heard other persons

affecting classes of the community cannot be excluded, or relaxation the

S. 32. rule against the admission

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J in Hall v Mayo 97 M 416, *Green v Chelsea*, 21 Pick 80; *Dunbar v Llewellyn*, 15 Q B 791, *Queen v Bedfordshire*, 1 E & B 535. But the d i
tion must relate to the general right, and not to particular facts which app
or negative it. *R v Bliss*, 7 A & E, 550; *Crease v Barrel*, 1 C. M & R 919,
R v Berger (1891) 1 Q B 823, *Merce v Denne* (1905) 2 Ch 303, 81
Ratcliff v Marsdon 72 J P 475, *Fouke v Berrington*, (1914) 2 Ch 303, 81
13, Fay § 617 *Phy Ed* 7th Ed 287

The best way to
as far back as living
regard to the preceding
is not however essen

any evidence of modern
admissibility of such evidence. *Crease v Barrel*, 1 C M & R 919, 920,
raton v Llewellyn 1 Q B 791 (801); *Wills Ed* 229. Facts in issue are releva
facts within the meaning of section 32 of the Evidence Act, and statements ma
by deceased persons about facts in issue are admissible under the rule
Raghunath v Vithalaram; 34 Ind Cas 875, disapproving *Fulch v L*
15 B 565

This clause permits proof to be given of a statement of a deceased person
that in his family or in the community of the estate to which he belonged
and such a
been likely
statement b
Parbati v C
to give his
grounds of that opinion, information derived from deceased persons, and
must be the expression of an independent opinion based on hearsay, and
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2 L R Ir 159 60, *Phy Ed* 7th Ed 286

Statement of

Statement of individual

was always regarded
such is always receivable

R 14. So also maps

are also receivable. *R v Milton*, 1 C. & K. 62; *Wigmore* 344, *Per* 111,
Alcock v Cook, cited, 1 Ph Ed 251

The same rule is applicable in

Dow 297; *Smith v Earl Brounlon*

2 Ch 303. Maps prepared by o

matter may also be received. *Hammond v Bradstreet*, 10 L R 111,
Fulcher 1 E & E, 111. Copies of Court rolls can also be admitted under

section. *Plaxton v Dare*, 11 B. & C 17; *Mt. Gen v. Emerson*, (1821) 1 C
619, *Flow v Parker*, 5 F. R 26. So also deeds and leases, between persons

In *Brisco v* it is as good as certainly disreputation, for a jury are summoned from the country at large, and are not themselves likely to know of the matter. Yet where the matter has been before

went by default. *Neil v Devonshire, supra*. Similarly judgments, decrees, and orders of Courts and of similar bodies, if final, are admissible as evidence of reputation. *Step Dig Ev Art 30*. But here also the persons acting as Judges had no knowledge of the thing. *Rogers v Wood v. Villebois*, 13 M & W 198; but in this section it is stated that the fact that no one in the region had ever heard of the right, custom, or boundary being as alleged should be admissible as a negative reputation. *Drinkwater v Porter*, 2 C & K 182; *Anglesey v Hatherton*, 10 M & W 239; *Wigmore* § 1095.

Declarations as to public or general interest. In proof of public or general rights or customs or matters of public or general interest, statements

32. *Hickie*, 15 Q B which some class of which are based on the customs of manors (Barrett, 1 R 919), parishes (Berry v Danner, Per 106, Evans v Mithy, 1 connected hamlets (Thomas Jenkins, 1 manors (Barnes Dawson 1 M & S 77), Wills 2d Ed 222 For the purpose of the rule, the test what is public is as to whether the subject in question is sustained, and, as it were, spirited decision of a correct opinion Where although it is of public interest and forms the

subject matter of the reputation The question next arises, about what is received as trustworthy The principle already examined is—that the nature one about which a trustworthy reputation is an active, constant and intelligent discussion by trustworthy conclusions As a rule should be one of public, or general or public interest, and the common phrasing though it varies loosely But this is still only a rule of thumb To decide difficult cases it is necessary still to seek the living principle and ask anew whether the matter is of such general interest to the community that by the thorough sifting of active, constant and intelligent discussion a fairly trustworthy reputation is likely to arise *Wignore* 1086 see also *R v Bedfordshire*, 4 E & B 793 *R v Bedfordshire*, 4 E & B 533 Declarations made ante mortem by persons who are now dead in respect of a question relating to a matter of general or public interest even if they be no more than evidence of reputation or hearsay evidence, are admissible *Busoid v Aenay*, A I. R. 1929 Cal 533—C W N 439

Interest The term 'interest' here does not mean that which is inherent in gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest or some interest in which their legal rights or liabilities are affected Per Lord Campbell, C J in *Queen v Bedfordshire*, 4 E & B 533 The interest spoken of in the rule is that of ownership or some lesser property in the chattels land or franchises in which an individual may possess a public more or less extended interest from ownership is no ground for assertions regarding it *Chambers v Evans*, 1 E & B 404

Boundaries An extra-jurisdictional boundary, being on a matter of public interest, to have been made by one person in an assumption may be made in favour of any person resident in the community affected by the position of a public of actual knowledge may at any time be demanded by the presumption *Chamberlayne's* 1 E & B 2793

Public custom Where a house in a village is privately sold, proof of a custom in the remainder of the village gets one-fourth of the purchase price of a similar custom with regard to a let or an inferior interest *147 (18) F R 147*

Sivanatha, 17 heads of districts are often accepted as evidence *Ev 190*, see also *Paul Rai v Iam Hu*, 1 N W 1 *Mahomed*, 3 N W P. 204

Opinion What is offered must be in effect a reputation, not the mere assertion of an individual But reputation includes and is often learned

witness was "What have you heard old men, now deceased, say as to the reputation on this subject?" Thus, though in form the information may be merely what deceased persons have been heard to say about a custom, yet in effect it comes or ought

Wymore § 1581, see also *Porter*,
2 C. & K 182, *Earl of* *lebank v*
Thompson, (1903) 2 Ch 3; *putation*
from deceased persons. But "reputation is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from

180 it is heard
E 679.

In *Mercer v Denne* (1904) 2 Ch 534, the suit was for enforcing fishing rights. 1639, under an information by the Attorney-
ich the s-a extended was excluded In rejecting
it p 543 "I am of opinion that these deposti-

tions are not admi
right which the Crov
the depositions of
on the question to
witnesses in other actions are admissible against strangers amongst other cases,
if they relate to a custom where reputation would be evidence, but then those
putation and not of matters of
iorities .. that reputation as
also *Ireland v Powell*, cited in

Itq v Bliss, 7 Ad & E 555 In *Ireland v Powell*, *supra*, the question was
whether a turnpike stood within limits of a town, and though evidence of
reputation was received to show that the town extended to a certain point,
yet declarations by old people since dead that those houses formerly stood
he ground that those
Denne, (1905) 2 Ch

(1914) 2 Ch 303 So the reputation :
"I know the right and custom to
understand the general acceptance of the custom by the community to be such
and such" is admissible The deceased individual declarant is merely the
mouthpiece of the reputation Whenever, therefore, individual declarations are

S. 32.

Birell, 1 C M & R 925, Drinkwater v Porter, 7 C & P 181 But in *Barraclough v Johnson, 8 A & E 93* Lord Denman C J said 'I do not agree that it is necessary for persons giving an opinion as to the publicity of a way to state that they found them by reputation although reputation to some extent' In *I* establish that although matters of public opinion inference of fact allows evidence of opinion in respect of any matter of public or general interest, the test being whether the deceased person expressing the opinion was likely to have had knowledge In the case of Mobants, even if they may have had knowledge by means of oral tradition handed down from Mobant to Chela, the opinion would be relevant but not particular facts. *Rini Prasad v Shiro* 12 Lib 497-A 1 R 1931 Lah 16

Opinion must be of competent person, The reputation to be admissible must obviously have been formed among a class of persons who were in a position to have sound sources of information and to constitute intelligently to the formation of the reputation *Wignmore § 1591* In *Weeks v Sparks 1 M & S 693, Le Blanc J* said "And the only evidence of reputation which was received was that from persons connected with the district" The rule generally adopted upon question after a foundation is on the evidence of reputation what old persons who were in a situation to know what these rights are have been heard to say concerning them "Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural that they would discourse together about information Per Lord Kenyon in *More* is thus laid down by Parke B in *Crease v*

hood But where the right is really public—a claim of right which seems difficult to which all are concerned but of course it would be shown to have some frequently using the road in dispute See also *Duke of Buccleugh v Duke of Devonshire* 4 Frob 467 (1869), *Daniel*

statement untrust-
worthy to the admissibility
before the dispute

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have had a personal knowledge of the facts, and to have stood quite disinterested
are received in evidence. In cases of general rights, which depend upon
immemorial usage, living witnesses can only speak of their own knowledge to
what has passed in their own time, and to supply the deficiency, the law receives
the declarations of persons who are dead. Therefore, however, the witness is

them would lead to the most dangerous consequences. Accordingly, I know no
rule better established in practice than this, that such declarations shall be
excluded. With respect to questions of prescription, I have known many

be made before even the existence of any actual controversy, concerning the
subject matter of the declaration. *Davies v Loundes*, 6 M & G 473 (518). So

a dispute was

G, 30 L J P

eclarations, has

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(are admitted) upon public rights, made *ante litem motam*, when there was no
existing dispute respecting them, is that these declarations are considered as
disinterested, dispassionate and made without any intention to serve a cause or
mislead posterity, but the case is entirely altered *post litem motam*, when a con-

might tend to support the declarant's own title will not of itself be sufficient to
exclude them. *Doe v Davies*, 10 Q. B. 314. *Halsbury Vol 13* ¶ 469. So
"there must be, not merely facts which lead to a dispute, but a *lis mota*, or suit,

Shamlal v Radha, 1 C. L. R. 173; *Anadi v Nandlal*, 16 A 665. So also where

Act *Sangram Singh v Rajan Bhai*, 12 C 219=12 I A 183 (P C). But this clause does not cover statements of facts made by interested parties in denial, in the course of litigation, of pedigrees set up by the opposite parties *Narain v. Chandt*, 9 A 467=A W N 1897, 118. "The statement declared to be relevant by the 5th clause is a statement relating to the existence of any relationship between persons alive or dead (the language imposes no restriction), is special means of by the Calcutta and corresponding rule in which the question can certain persons

Ram Chandra v Jogesua
Oriental G S Company
 Oudh Select Case 265
 admission of what for the
 whether a particular person survived another, and it is obvious that this clause does not justify the
 man was at the time
 his family *Parbati v*
 of relationship, the statements of the deceased relations, servants and dependants

every instance, it must be a question of fact as to whether the person who made the statement had special means of knowledge *Rama Krishna v Tirunarayana*, A. I R 1932 Mad 193=62 M L J 116. The effect of the section is to make a

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English Law. Declarations relating to pedigrees are allowed where they were made, before the commencement of the suit, by a deceased person provided the person making them was related by blood to the person to whom they refer, or was the husband or wife of such person. *McKintley's Est* 271, see also *Shrewsbury Peerage Case*, 7 H. L. Cas at p. 26 Under the term 'Pedigree' are but when marriage, others or 447 In words the declarations of deceased persons respecting the places where their relatives were born, and where they were married, resided, went to, or died, cannot be received. But in *Shields v Boucher*, 1 De G. & S 40, Sir J. L. Knight Bruce V. C. said: 'If the place of birth in *Rex v Erith*, had been a genealogical fact as it was not,—had been material namely for any genealogical purpose, which it was the Bench might possibly have received. *Deauchamp*, Hurler V. of *Monkton v Att Gen*, 1 Deg 38 So 'declarations of the

affinity only, when the pedigree is in short, which is strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family by the declarations of deceased persons. *Per* such rejected with, the question of pedigree, or when they are not required for some genealogical purpose (*Haines v Guthrie*, 13 Q. B. D 818) they will be rejected. *Phip Est* 7th Ed 298

(2) like statement in a deed or will relating to the affairs of the family or in any family pedigree etc. when made before the question in dispute was raised. Section 50 provides that when the Court has to form an opinion as to relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject is relevant. *Per* *Mullick J* in *Bibi Fatma v Abdul Kasim*, A. I. R. 1928 Pat 539-110 Ind Cas 428 In India it is difficult to prove such facts as the date of birth after the lapse of many years, and it would be unreasonable to demand such a class of evidence as would justly be demanded in England. But the evidence must be such as to carry conviction to the mind. *Nawal Sha b a Begam v Nanhi Begam* 11 C. W. N. 130 (P. C.)—1 M. L. T. 429

(by) requiring the facts from the mouth of the witnesses who has the knowledge
I. E. A.—71

§. 32. of them In cases of pedigree, therefore, recourse is had to a secondary sort of evidence,—the best the nature of the subject will admit, enabling the descent from Peerage Case, & Camp being impossible to prove the declarations of the reputation must proceed on particular facts, such as marriages, births and the like, from the necessity of the thing, the hearsay of the family as to the particular facts is not excluded” In the same case *Laurence J* observed

the family is of which would

In *Sturges v* pose the ground

is that they were matters relating to long time past, and that it was necessary to relax the strict rules of evidence for the purpose of doing justice” so declarations under clauses 6 and 7 are admissible when the evidence is not procurable. Vide *Ram Narayan v Monce*, 9 C. 613; *Surjan v Sardar*, 5 C W 19 P. C.

Circumstantial guarantee

necessity of such a statement is thus:

Ves 511 “It was not the opinion of tradition, generally, is evidence persons having such a connection natural and likely, from their speaking the truth, and they could

that: declarations in the family, descriptions upon monuments, descriptions in Bibles and registry books,—all are admitted upon principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth” In *R v Erismell*, 3 T R 720, *Ashhurst J* said “It is natural for persons to talk of their own situations and of their families. The evidence is in its nature of an unsuspicious kind, it is generally

them are proved to be dead or incapable of giving evidence. *Mahomed*, 81 Ind Cas 927=6 Lah L J 299=A L R 1925 Lah 63, see also *Prohlad v Ramsaran*, 38 C. L J 213.

two points to be illustrated. Illustration at differs from of a person evidence is that (5) refers to (6) refers to

of things, such as genealogical trees, tomb stones etc. Clause (5) refers to relationship between any persons (living or dead) whereas clause (6) refers to

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"not necessary that it should have been made by a person who had special means of knowledge, but it must be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon tombstone, family portrait or other thing on which statements are usually made" *Field's Evidence 6th Ed.* p 139, *Norton v* 188

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whether the statement offered be an individual's assertion or the family repute.
Wigmore § 1195; see also *Colbet's Estate*, 51 Mont 453, *Young v State*, 36 Or. 417.

Tr 1166, 1179, 1181,
son in the neighbour-
Wood, 14 East p
remember the case of

plaintiff to J F In delivering his judgment *Best C J* said "Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that to be informed of the state of the family of relation who is distantly connected by

deceased persons
to have been made
made *post litem*, in

Moo & Rob. 28) Similarly in *Crispin v Daglion*, 3 Sw & Tr 44, *Sir Cress-*

32. *well Creswell* observed "I can well understand that where a matter is likely to be discussed and well known in a family, a member of the family may be allowed to give evidence of it, but in this case the plaintiff according to his own
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and also of persons who though not related by blood or marriage to the deceased were intimately acquainted with its members and state, shall be admitted to give evidence after the death of the declarant to the extent as those of deceased members of the family.

The law presumes against a declaration made by a person in a ceremony is invariably insisted upon as to the class to which the parties belong. The law therefore relaxes the rules of evidence and in the absence of statements of persons or their general reputation of the Evidence Act 50 of the Evidence Act

Statement made during the course of a trial of trustworthiness must have been made *ante litem motam*. *Wigmore § 1451* In *the Case of Camp 401, Mansfield C J* said "In the *Inglesea Cause* many declarations of deceased persons were given in evidence, but after an attentive examination I can not find that any of these had been made after the dispute had occurred. I am not aware of any other authority upon the subject in our law, but the distinction of declarations *ante litem motam* and *post litem motam* is clearly taken in a foreign treatise of great learning, entitled *De Probationibus*. You must have now only to notice the observation that to exclude declarations you must show that the *litem mota* was known to the person who made them. There is no such rule. The line of distinction is the origin of controversy and not the commencement of the suit. After the controversy has originated all declarations are to be excluded, whether it was known to the witness or not. If an enquiry were to be instituted in a controversy was or was not known would be wasted and great confusion. I conceive that the deposition now in the same case the reason for the exclusion, is thus stated by *Heath* and their manner of contest has originated and not the other way." *Heath* and their manner of

& M 160 *Brougham L C* observed "If there be *litem mota* or a contestation has precisely the same effect upon a person's mind with *litem contestatio* what person's declaration ceases to be admissible. It is no longer strong. Lord Eldon calls it a natural effect. If he be honest

not admissible, and not to have in *Doc v Ranta* adoption of the question of the question was directly in issue, such statements should not be admitted in evidence in the present suit under subsection 5 section 32, as they are not made before the question is disputed was raised *Ramkrishna v Tiru- M L J 116* Declarations as to the inadmissible in evidence if made post the commencement of legal proceedings, but before even the existence of any actual controversy concerning the is made in the obvious interest of the *Mahomed Isam v Saïd Mahomed,*

to Roman law, but the term *lis mota* meant of the action, and was not in our law the term *lis* is taken controversy, and by this *lis mota* in controversy, and not the commencement of the suit *Tay § 692, see also Berkeley Pec age Case, 1 Cramp 417 Monltou v 111 Gen 2 Russ & My 161 Gee v Warl, 7 L & B 509* The ground on which evidence of this description is excluded is the supposition that, when a party to range themselves or to have imbibed their would become tainted at its very source *Goolers* *Mr Justice Laurence* said 'W good will, tempt many who from the truth in the laxity of conversation Can it be presumed that a man stands perfectly indifferent, upon an existing dispute respecting his kindred? His declarations *post litem motam*—not merely after the commencement of the law suit, but after the dispute has arisen, for that is the primary meaning of the word *lis*—are evidently more likely to mislead the jury than to direct them to a

by a man who has an interest

It was once said by *Baron Alderson* in *Wallis v Beauchamp* 6 C & P 561 that it was sufficient if at the time of the declaration the state of facts existed (for example the birth of a child) as to which the controversy afterwards arose is to the controversy and to Although the dictum of *Baron*

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facts which

may lead to a dispute, but a *lis mota* or suit, or controversy preparatory to a suit actually commenced, or dispute arisen and that upon the very same pedigree or subject matter which constitutes the question in litigation See also *Stanel v Wade*, 1 Myl & Cr 338 (306), *Bulter v Mountgarret*, 7 H L Cas 633, *Fredrick v 111 Gen 41 L J P & M 1* In *Bahadur Singh v Mohar Singh*, 24 A 94 (107) P C the principal oral evidence consisted of statements made by the plaintiff as to their descent the information as to which they had received from their ancestors Objection was taken that such of these statements as were made since 1847 were inadmissible in

S. 32. evidence under clauses 5 and 6 of section 32 of the Evidence Act (I of 1872) and that they were a family, dispute

exclusion would not apply to what was done in prevention of dispute, even were it in support of the title of the declarant; and although in the belief that his title would be affected by the same circumstances as the party seeking to avail himself of the declaration. Thus in *Goodrich v Mass*, Cowper, 591, Lord Mansfield in receiving such evidence said "I have known advice given to a father and mother to make attested declarations in writing under their hand of the present state of the truth

in *Moncton v Att Gen*, 2 Russ & My. 161, Lord Brougham ascribed Lord Mansfield's view of admissibility to the principle that the declaration was made with a view to their own interest, but to preserve a constant as it were, record of facts peculiarly within their knowledge (which is one of the grounds of admitting such hearsay evidence); see *Lord Peers Case*, L R App Cas 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

but he admits that this principle must not be pushed too far. According to section 32, clauses (5) and (6) such evidence is admissible although the question is, whether

some feeling of interest, which will often cast suspicion on the declaration, has never been held to render them inadmissible.

Again, any controversy to exclude must be on the particular subject in issue, controversy in a merely analogous one, but not the issue itself, not necessarily carrying with it the elements of mistrust. Thus in a case respecting copy

where the point in controversy is foreign to that which was before controverted, there never has been, *a lis mota*, and consequently the objection does not apply."

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the party knew

of his own personal knowledge, or as is much more frequently the case, to what he heard from others to whom he gave credit; for they are only adduced as evidence of reputation in the family, and that is the only mode in which the tradition in a family can be proved, and the subject matter of that tradition can

511 (514); *Sheddén v. Att. Gen.*, 50 L. J. P. M. 217. But if instead of being

matters within their personal knowledge *Tay.* § 639, see also *Doe v. Randall*, 2 M. & P. 20, *Staney v. Wade*, 7 Sim 611, *Robson v. Att. Gen.* 10 Cl. & Fin. 500. So also proof by one of a family, that many years before, a younger brother of the person last seised had gone abroad, that the reputation in the family was that he had died there, and that the witness had never heard in the family of his having been married, is presumptive evidence of his death without issue. *Doe v. Griffin*, 15 East. 293.

not therefore necessary. *Monkton v. Att. Gen.* 2 Russ. & M. 160; *Berkeley*

32. *Peerage Case*, 1 Camp 116. The difficulties, then that arise are concerned with the line between declarants that may fairly be supposed to be thus qualified

like? Secondly, shall any be for example, according as the consanguinity or by affinity?

be supposed to be present when, and how, and by what means, and by what facts, having an opportunity to know the facts, or holding a relation rendering it very probable that he would learn them truly? If it is so the line need not be drawn strictly at relatives. But in the language of Lord Erskine in the interest of the person in knowing the connections of the family (*Wolfe v Young*, 13 Ves 140) does require the line to be drawn there, excluding non-relatives" *Wigmore* §§ 1486, 1487. See also *Annesley v Inglesby*, 17 How St Tr 1160; *Roane v Wolsey*, 2 Lee Eccl, 135; *Duchess of Kingston's Trust*, 20 How St Tr 355; *Berkeley Peerage Case*, 1 Camp 401; *Walker v Hume*, 18 Ves 443; *Johnson v Lawson*, 2 Bing 88; *Casby v O'Shaughnessy*, 1 Jur 140; *Polins v Gray*, L R 13 Ch D. 126. But "such a narrow test seems too narrow."

Even in England, where so much of personal advancement and material prosperity for the individual depended upon his family rank and his rights of inheritance, it seems too much to say that only those who have an immediate property interest in learning the family history can possibly have adequate information; for family physicians and chaplains, old servants, and intimate friends may, in cases be equally and sufficiently informed" *Wigmore* § 1487. The only *Lauson*, 2 Bing the family for rejection said it would be a namely, the consanguinity, affords such evidence as testimony could of intimacy or confidence that subsisted between the party and the declarant.

"It may be noted," says *Prof Wigmore* "as to this reasoning, first, that the result is inconsistent with the general language used in the earlier judicial opinions, and is supportable only on the narrow test of *Lord Fraser* before mentioned, secondly, that the special reason given, namely, the inconvenience of an investigation into sources of knowledge, is anomalous in the law of Evidence, for no Court is allowed to decline to investigate the source of a witness's qualifications so far as may be necessary, while in each case the Judge's discretion permits, and old would surely be no more found to be" *Wigmore* § 1487. A statement admits of

Special means of knowledge

names of persons from whom they

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existence of relationship, the person having special means of

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267-123 Ind. Cas 907. Family birds have special means of knowledge regarding the facts of the relationship between the different members of the families of their *jajmans*. Consequently statements made by them as regards the relationship between members of the family would be admissible in evidence under 32(5). *Anandi v Nand Lal*, 22 A L J 657-46 A 665. It is the business of a *muasi*, who is a hereditary family bard, to recount himself
 recounts in song
 hearsay does not
Abdul Ghafer v I
 L. J. 583 (P C)
 Court had special
 cannot be received in evidence and it cannot be accepted as evidence that he had knowledge. Proof of special source of knowledge is a pre requisite to the admission of the document in evidence and until the document is received in evidence no presumption can be made from the statement contained in it. *Bhima v M Sender*, 9 O L J 186-4 U P L R (O C) 79. Before a pedigree said to have been prepared by a deceased member of family can be admitted in evidence under section 32 (5) it must be proved that it was either prepared by the deceased or that the deceased had that personal knowledge and belief which must be presumed in any statement of the deceased person which is admissible in evidence. *Mahomed v. Sayid*, A I R 1931 Oudh 147-8 O W N 349.

Qualifications of the declarant. Upon the general principle of testimonial knowledge, the qualifications of the deceased declarant—his relationship, or whatever is relied upon as equipping him with information—must be shown in advance. *Banbury Peerage Case*, 2 Selw N P 764, see also *Taylor* § 640, *Wills* Ev 213 214. In India the existence of special means of knowledge in the

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It no where appears

that he had any other knowledge than as *muh'tear* acting for these ladies. He was not shown to have been a member of the family, to have been intimately connected with it, or to have any special means of knowledge of the family concerns. Therefore in their Lordship's opinion he does not come within the description of a person having special means of knowledge. See also *Bijay Bahadur v Bhupendra*
 declarant has sufficient
 tion is. *Wignore* § 14
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 clause 5 of section 32
Lal v Radha Bibee, 4 C
 ment Court is admissible in evidence under s 3, cl 5 of the Evidence Act,

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suit, in which she stated, "I have no issue or any near relative *Mall and* is related to me as a daughter's son and *Khawati Lal* is my husband's younger brother. These are my relatives on the husband's side." In admitting the evidence *Lord Shaw* observed, "In this situation their Lordships are of opinion that, in the most solemn form, this lady had declared facts which must have been within the scope of her knowledge. If the facts be sound, there can in their judgment appeal from is correct."

obtained in his deposition and in affidavits filed by him are admissible evidence under section 21 (1) read with section 32 (5) of the Evidence Act, made by a person having special means of knowledge, whether personal or hearsay. *Tarathur v. Maru Gopu*, 33 Ind. C.S. 269. Where the Court below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not conformed with section 32 of the Evidence Act and on the face of the evidence it was sometimes uncertain whether the witnesses were speaking from their own knowledge or from information derived from others, it is not in law an error to admit it in whole.

nor in the latter case to question the manner in which the Court has applied the provisions of section 32. *Safimunnisa v. Shaban*, 20 A. 331 = 9 C. W. N. 105 P. C. So where the witness is speaking from hearsay he must show that his knowledge is derived from the person whose statement is admissible under the section. *Vile Jagat Lal Singh v. Tejshwar Singh*, 25 A. 43 = 7 C. W. N. 49.

Statements are admissible to prove the facts contained in the statement on any issue. In England declarations are admissible only in cases in which the pedigree to which it is only relevant to the issue is only admissible in England, not where they are admissible in Scotland. Thus in *Scott v. Brown*, 11 L. J. Q. B. 46. This rule thus interpreted, says that declarations otherwise satisfactory, can nevertheless be used in those cases only where the issue involves a material question of pedigree, or genealogy, or the therefore inheritance cases. *Higmore* § 1503. This view seems to have its origin in the observation of *Lord Ellenborough, C. J.* in *R. v. Enth*, 5 East 56, where he observed, "This was a case in which the question was, whether the declaration of the father of a bastard child, as the place of his birth, the bastard's birth was competent of that fact? The only doubt which has been introduced into this case has arisen from improperly considering it as a question of pedigree. The controversy was not as in a case of pedigree, from what parents the child has derived its birth, but in what place an undisputed birth derived from known and acknowledged parents, has happened. The point thus stated turns on a fact, and is therefore not falling within the rule." and is

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These declarations were first made in England in inheritance cases directly a part of the issue, but in litigation ought to have no bearing on the admission or exclusion of evidence. A deceased father's entry in a family Bible is equally trustworthy, whether the issue subsequently arising happens to be framed upon a

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promissory note, or in application
majority of American jurisdictions
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pedigree, and when the incidents of

cases, whenever they become
Similarly in the colonies the ru
D. 818, was not followed In

section 32(5) of the Indian Evidence Act such evidence is admissible In
Dhanumal v Ram Chunder, 1 C W N 270=24 C 265, a plaintiff in a former
suit, verified by a deceased member of a family and as such having special
knowledge, was held admissible under section 32(5) of the Evidence Act, to prove
the order in which certain persons were born and their ages In delivering the
judgment of the Court *Pethasam C J* said It was contended on the part of
the plaintiff on the authority of the English cases that as the question at issue
in this case did not relate to the existence of any relationship by blood marriage
the statements were excluded by the
at point the law in India under
England, and that the effect of the

sons of Sumbho Nath were born and their ages, and when admitted to my mind,
satisfactorily proves that the defendant was the son who was born on the 6th
June, 1868 Similarly in *Ram Chandra v Jogeswar* 20 C 753, for the purpose
of the decision of a question of limitation it was necessary to prove the date of
the plaintiff's birth The plaintiff and one of his witnesses each spoke to
statements made to him by relations of the plaintiff who were since deceased
relating to the date of the plaintiff's birth The defendant objected to such

Bipan Behary Dey v Sreedam Chunder, 13 C 42 has been practically overruled
by *Dhanumal v Ram Chandra*, *supra*

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S. 32.

Stephens, Kent Assizes . . .
 it has been said "Here
 when he married, and what children he had, etc., of which it is not necessary
 to presume I have better evidence. So to prove my father, mother, cousin &
 other relations, beyond the set, dead; and the common reputation and belief
 of it in the family gives credit to such evidence." On the authority of *R v*
Frith 5 East 539, the place of birth or death—something more than the fact
 birth or death—has by some Courts been thought to be inadmissible. But
 question was finally settled in England in *Shields v Boucher*, 1 Dig & Sm
 where *Knight Bruce* said "If the place of birth in *Rex v Frith* had been a
 genealogical fact, as it was not,—had been material, namely, for any general
 purpose which it was not. *Lord Ellenborough* and the Court of King's Bench
 differently." See also *Lord*
 & M 176 where he observed

ship of consanguinity or of affinity only,
 are returned;
 pedigree,
 the declaration
 have been previously connected with the family respecting which their
 tions are tendered." Moreover since the proof of a particular relation
 depends on the proof of some specific fact, such as birth, marriage or
 the date or place of
 place of residence;
 history these facts
 of the rule when
Wills 12 212, *Monkton v 1st Gen 2 Russ & Myl* 147, 150; *Dell v*
Ir, C L 17, A statement as to the age of a member of a family, made by a

ceased person having special
 onship within the meaning of section 2
Narasimha Chari, 25 M 183, 219-21
 see also *Ram Chandra v Jogeswar Narain*, 20 C. 758; *Byambharr v Sarda*
 18 C 42

Contemporaneity of the Statement It is not necessary to show that
 the declarations were contemporaneous with the events to which they relate
 as *Lord Brougham* has well observed "a statement would defeat the
 if not

1st Gen, 2 Russ & Myl, 157, 158, *Tay Ev* § 639

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 neighbourhood, and family transactions among the relations of
 Therefore, what is thus dropped in conversation upon such subjects may be

presumed to be true." *Per Lord Mansfield in Berkeley Peerage Case* 4 Camp. S. 3
401.

Cases under clause (5) Very liberal interpretation should be given to the words "when the statement relates to the existence of any relationship by blood family about certain majority of members of *ishna Lal v Raj Kumar*, 104 Ind Cas 299=1 Luck C 97=A. I R 1927 Oudh. 278 A statement as to the existence of a relationship is admissible even though it was made in a

clause *Chandreswar, v*

mark of the party,
appellant in his own

s 11, if not under s 32 (5) whether it is shown that the application was filed by a person who was admittedly the testator's nephew and claimed also to be his adopted son and therefore was in a position to know the date of his death and the age of *Lachin*
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relative
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that his father was
'6 Before a pedigree
made by a person

relates to the existence of relationship by adoption *Danabati v Batsundara*, 36 M 19=18 Ind Cas 989 A pedigree filed in a Settlement Court for the preparation of *Kheuat* cannot be put in evidence as a family pedigree under a

S. 32 32 (6) It can be admitted only under s. 32 (5) for which purpose it must be proved that the document represents statement as to the existence of a certain relationship by blood or marriage made by a person who had special means of knowledge in respect of the matters thus stated and made before the question now in dispute was raised. *Mithu v Bhulan*, 15 O C 364, see also *Srinivas v Pilok Chant*, 36 Ind Cis 66. A statement in a will made by the father describing his adopted son, aged 10 and so as the sole beneficiary is admitted to prove the age of the boy, under s. 32, cl. 5 and 6 of the Evidence Act. *Krishnamachariar v Veeravalli*, (1913) 11 W N 35, = 13 M L T 350. L J 517 = 19 Ind Cas 152. The question for decision was whether the plaintiff was the legitimate daughter of one K and R. The respondent contended that R was not the legally married wife of K, and in proof of it produced a compromise and a decree between R and another person by which R obtained only a small amount as maintenance. He also relied upon a statement made by R on a certain occasion admitting that she was the concubine and not married wife of K. It was held that the statement of R was admissible evidence under section 32 clauses (3) and (5). *Parbat v Maharaj Singh*, 19 Ind Cas 188. A statement made by a person before a public officer as to his age is admissible.

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199 Hearsay evidence is not admissible under section 32 clause 5 of the Evidence Act, to prove the case of fosterage, in as much as, even if it be a statement of that connection by fosterage can amount to relationship in any sense of the term the relationship is not by blood, marriage or adoption. *Prithvi v Anand Qudsi*, 21 Ind Cas 612. The term 'relationship' in clause (5) of section 32 of the Evidence Act means relationship by blood, marriage or adoption.

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ing of clause (5) of section 32. *Achyutananda v Jagannath* 21 C L J 739 = 20 C W N 122. Statements contained in the plaintiff's statement within the meaning of clause (5) of section 32 of the Evidence Act are admissible.

statements contained in the plaintiff's statement within the meaning of clause (5) of section 32 of the Evidence Act are admissible.

A L J 349 = 39 A 426. Where the question is whether A born on a certain date is of age an entry in a book containing the record of births, deaths and marriages in the family kept by his father who is dead that he was born on that particular date, is admissible under this clause. *Mohamed Syed v Jagan*, 21 C W N 257 = (1913) 401 (P L). A statement by a person to X, as the sole wife of a person having special means of knowledge of the facts, is admissible. *Krishna Iyengar*, 21 C W N 257 = (1913) 401 (P L).

(1913) 401 (P L) = 21 C W N 257 = (1913) 401 (P L).

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Ab Justice Mooker

that the section

should be excluded, first because it relates not to the existence but to the non existence of a relationship, and, secondly, because the relationship is not proved.

■ Mohunt and his *chela* is not ■ relationship by adoption On behalf of the defen- S. 32

13 C 42, Satish Chandra v. Mohendra Lal, 17 C. 849 and Ram Arishna v. Manindra Mohun, 20 C L J 302. It is not necessary for our present purpose to determine whether the fluctuation of judicial opinion indicated in the two sets of decisions mentioned, is more apparent than real, and whether they may not be reconciled by a recognition of the principle that a statement as to the time of commencement of relationship is so indissolubly associated with the existence itself of the relationship, that it may be rightly regarded, without undue stretch of language, as a statement which relates to the existence of that relationship. *Oriental etc Co Ltd v Narashimha* 25 M 183, and *Patambar Kuru v Raman*, 2

that question, it
tion, viz, first, is it
by adoption, and, secondly, is a statement that A has one *chela* B, and has no other *chela*, a statement relating to the existence of a relationship? We are of opinion that both these questions should be answered in the affirmative. In the first place, there is no reason why the term 'adoption' should be interpreted in a restricted sense, that the expression that A has adopted B as his *chela* is found in judicial decisions of the highest authority. In the second place, the expression 'relates to the existence' is obviously very comprehensive and need not be

The statement was treated as admissible in evidence but was held not to be conclusive evidence under ship by blood,

A document containing a statement of a deceased person as to the mode of succession obtaining in a particular family is also admissible in evidence *Patambar Kuru v Raman* 24 Ind Cas 519, see also *Sheo Lal v Gour Narain*, 7 Ind Cas 218

25 A. 236-5 Bom L R 410-30 I. A. '91 See also *Kedarnath v Muthumal*, 40 C 555 (P C) The legal presumption as to paternity raised by s. 112 of the Evidence Act is applicable only to the offspring of a married couple. A person claiming as an illegitimate son must establish his

to be good respect, but, in the
declaration, the declarations of illegitimate members of the family are
persons who, though
intimately acquainted
after the death of

Ghurneeb Mossam v. C
the age of a person, the entry of
be statements of his deceased father
ection 35 *Munna Lal v. Kaneecham*

A I R 1929 Oudh 113. A settlement of pedigree is admissible in evidence either under s 32 cl (5) if it be shown that it amounts to the statements of deceased persons, who were members of the family and as such had special means of knowledge and further that these statements were made before there was any controversy as to the pedigree. *Sarfaraz v. Sarfaraz*.

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Act, but, in the case of an entry in the register in question, there is no showing by whom the statement entered was made, much less that the person making the statement had any special means of knowledge. *Mr Collier v Mrs L. Bavan, 2 N L R 31* In an application for letters of administration the rights of the applicants to be considered the next heirs of the deceased depended on proof that the relationship between their great-great-grandfather and the deceased was that of full brother and sister.

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or deed of exchange, dated the 17th January, 1902, as Kurisnama as to the relationship were produced by the applicants. The Kurisnama was held admissible in evidence *Shazadi v Secretary of State for India* 100 Q 1059 P C

Cases under clause (6) Entries made by a parent or relation in Bibles, prayer books, missals, almanacs, or indeed in any other books or in any document or paper, stating the fact and date of the birth, marriage, or death of a child, or other relations are also received as the written declarations of the deceased persons who respectively made them. *Tax Ev* § 610 These adoptions may be made by the declarant's own writing, or by assenting to or adopting the true statement of another person. *Id.* § 611 If a person is reputed to be an ancestor of another person, and the pedigree is supported by all good evidence, the fact of such relationship may be proved by the reputation of the person so reputed to be an ancestor. *Id.* § 612

formal one—as, a deed or will—does not make the ^{an} *Murray v Mulner*, L R 12 Ch D 845; *Doe v. Pembroke*, 11 East 504. Such statements

them, or did anything that amounts to showing that they recouped

"A pedigree, whether in the shape of a genealogical tree or map, or contained in a book, or moral or monumental inscription, if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced. On what ground is this admitted? It may be that the simple act of recognition of the document, and consequent members of the family, is his information may

stated to be relations, or of information received by him from some deceased member of what the latter knew, or heard from other members who lived before his time. And if so, it may well be contended, that, if, the facts rebut that presumption, and show that no part of pedigree was derived from proper sources of information, then the whole of it ought to be rejected, and so also if there be some, but an uncertain and undefined part derived from improper sources. But when the

to that extent, the statements in the
, and are good evidence of the relation

adopted son that statement
the testator Chandressuar

book regarding the relationship of parties are admissible under this clause
Amrit Sarai v Prabli Dial, 89 Ind Cas 989.

wills or deeds are admis-
D 845, *Smith v Tebbit*, L
he principle that they are
the natural effusions of a party who must know the truth, and who speaks upon
, without any temptation
Deloch v Baker, 13 Ves
a Case 4 Camp 418. But
become admissible must

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10 M 362. So
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e, 11 East, 501
Dos v Ormerod
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32. 16 So recitals of descent, and description of parties in deeds or other family instruments, will be received, provided the deeds come from proper custody and are proved or may from age be presumed, to have been executed by a member of the family to which the statements refer. *Marmayon Peerage* Pr Min 111; *Hastings Peerage* Pr Min 200; *Boothwick Peerage* Pr Min 61; *Hengate v Gascoigne*, 2 Coop 117; *De Roos Peerage*, 2 Coop 541, 542; *Davies*, 1 Mason 269 cited in *Tay Et* § 651. But the execution of the deed by a relation is an inadmissible requisite. *Slaney v. Wale*, 1 Myl & Cr 200; *Port v Clarke*, 1 Russ 604; *Tay Et* § 651. Though a person cannot claim title under an unproved will he can rely upon a statement contained in it indicating the relationship of the parties. *Hutnarian v Rambarai*, 7 Pat 750; 7 Pat L 7484 = A I R 1928 Pat 159. A statement, in a will left by a deceased person, to the effect that he and his brothers were living, earning and holding property separately, is not admissible in evidence under any clause of section 32 nor under any other section of that Act. *Goluddas v Chandibai*, 4 S L J 225 = 10 Ind Cas 907.

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observed "Nor do we think that the first portion of the observation of Lordships is intended to lay down an exhaustive definition of 'family pedigree' as used in cl 6 s 32, Indian Evidence Act 1872. Those two words simply indicate the highest and the best type of family pedigree. The decision does not show that a pedigree not conforming to that standard cannot be a family pedigree."

pseuinness *Inden v Yellaba* 100 I L J 600 '81 The mention of . . .

and the sons are found to be in joint possession of the property the presumption is that the common ancestors held the property *see* *Nur v Juan*, A I R 1928 Lah 964. A family pedigree may be a pedigree kept by a member of the family or by another person on its behalf and it can be admitted in evidence, if it is written by a family bard for the purpose of keeping a record of the family even for its use and the use of the family. Such a record can be admitted even though not signed by the person making it.

665=A I R 1921 All 575, see also S. 3
Ind Cus 235-24 Bom L R 289

of a *Harduar purolat* is valuable on a question of a family pedigree *Lauya Singh v Allah Ditta*, 133 Ind Cus 874=A I R 1931 Lah 722

It is valid to presume after the dea

v Rhetlat, 21 Ind Cus 274 A pedigree was filed before the Settlement Court in

Gubaj, 16 Ind Cas 625 Although a
Evidence Act may be made with respect to :

32 (5) of the Evidence Act, though the entries in it were not of great value
Ram Din v Kanestha Patshala 25 Ind Cus 823

up were not
any of the
descriptions in section 32 of the Indian Evidence Act *Sorjon v Sardar Singh*,
23 A 72-2 Bom L R 492-5 C W N 49-27 I A 183 P C Where the
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members of the family made *anté litem motam* before there was anything to

THE INDIAN EVIDENCE ACT.

S. 32. throw doubt upon them, the evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they acted upon them or ascribed to them, or did anything that amounted to showing that they recognized them. If any man . . .
 who presumably would . . .
 pedigree, that evidence . . .
 instances Abdul Ghaffur . . .
 J 583 P C . . . 13 A. 188=12 Lrb 336=60 M L

Horoscope—evidentiary value of. A horo-scope may be tendered under clause 5 or clause 6 of section 32 or under s. 17 18 of the Evidence Act. Under clause (6) of section 32 . . .

the writer "is dead or . . . to come within this clause . . . has

Lat, 17 C

this clause

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been admitted as coming within section 32 of the Evidence Act and within clause 6 of that section. That clause makes entries made by persons, evidence of questions of relationship by blood, marriage, or adoption, where the deceased person had some special means of knowledge. As to that it is enough to say that it is not shown that the person who had made this horoscope had any special means of knowledge, and that the question which we have to decide is not one either of relationship by blood or . . .

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questions of relationship, the interpretation is also not sound. *Id. supra*, also 11 C W Evidence Act p 336 I Note. A horoscope is receivable in evidence under section 32, clause (5) of the Evidence Act and not under clause (2) of that section but the party making it must have had special means of knowledge. *Ravi Nathan v Murugappa* 33 Ind Cas 269=1916 M W N 41. see also *Gopal Chauh Hori* . . .
 Rattan 17 C

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In *Amardyal Singh v P - n*
 511=58 Ind Cas 72, a
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 scope could be admitted in evidence to
 admitting the horoscope *Miller C J*
 relationship between any of the parties

ments as to age made by deceased persons in the circumstances contemplated in the section were admissible. The horoscope, however, is merely evidence and is not conclusive and in face of the other conflicting evidence in the case I should have been inclined to remand the case for further consideration on this point.

the life of the son
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malai v Annamalai 10 L. W. 687=52 Ind. Cas. 456. Horoscopes deeds of adoption or of initiation as chet are admissible if the person writing them or hearing them read soon after their preparation is examined. *Shankergir v Chinnaji*, 71 Ind. Cas. 140=A. I. R. 1923 Nag. 1. Horoscopes containing date of birth and prepared by a person having special means of knowledge and who is dead is admissible to prove date of birth. A. I. R. 1927 Pat. 271=8 P. L. 1 730=103 Ind. Cas. 449.

Principle of authentication. The principle of authentication is applicable to proof of the execution or genuineness of a writing is in general applicable to a writing offered under the present exception. *Slane v Wade* 1 My. & Cr. 338. *Tracy Peerage* 10 C. & F. 154. No special considerations here need attention except as regards the necessity of proving the handwriting of entries in family Bibles or the like. The fundamental idea of authentication

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to the family, and therefore may be presumed to possess that authenticity which is derived from the tacit and common assent of those interested in the facts which they record. But such public exposure of the writing is not needed when it contains the signature of a specific member of the family and his signature is authenticated. So a signed chart of a family was admitted. *Montlon v*

inscription on a tomb
in the mansion are all
use in all those cases the
existing—the want of
ring or the Bible with
presumption—it would
only did not more or less
in case of family Bible,

there is no necessity of proving the handwriting of the entries. Proof of the handwriting or authorship of the entries is not required when the book is shown to have been the family Bible or Testament for then the entries as evidence derive their weight not more from the fact that they were made by any particular person than that being in that place a family registry they are to be taken as assented to by those in whose custody the book has been kept. *Alley J* in *Jones v Jones* 43 Md. 160, *Waggoner* § 1496. *Berkley Peerage Case* 4 Cump. 421 per Lords Ellenborough and Redesdale JJ. *Hubbard v Lees* 35 L. J. 1 x 169. *Goodright v Moss*, 2 Cowp. 521. *Slane v Wade*, 7 Sm. 595, *Shrewsbury Peerage*, 7 H. L. 1.

Value of statements under clauses (5) and (6). Statements of the kind referred to in section 32, clause (5) of the Evidence Act may be evidence, but

32. they must be received with great caution, since they are always open to the objection that the parties making them are not subject to any cross examination, the caution is all the more needed especially when the parties making them could not have been

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subjects is weighed with great caution *Moore's Facts on the Weight and Value of Evidence* 1150, 1156, *Matter of Williams*, 128 Cal 553, *Wood v Talbot* 65 N J Eq 310. Similarly in *Smith v Cooper*, 16 Bery 101, Sir J Romilly said "It is a true but just remark, that if one link in a pedigree is assumed any two persons may be proved to be related; and it is the usual observation in these cases, that the difficulty consists in properly weighing the consideration." *consider the of cases,*

is evidence of declarations made before any question arose as to the succession to this property but there is no trace that they were remembered or acted up

do really by attentive and careful observation recall the memory of what

witness should be convicted of perjury for speaking of what ^{has} been said in a conversation with a deceased person" *Nort Ev* 190.

CLAUSE VII.

Scope of the clause The "transaction" spoken of in section 13, clause (2) is one by which any right or custom was created, etc. It applies to private as well as public rights. Customs, also, may be private as well as public, as for

or rights may be given under clause (4) and not under this clause In England

to private titles? How is it possible concerns only these private titles? In rights as well as customs can be proved relate to any such transaction as is mentioned in section 13, clause (a). On principle there is nothing to object to the reception of such evidence. Under this clause private boundaries, titles or possession can be proved. "If such evidence may be offered to show customs and boundaries of a private manor, boundaries of a parish, tithes dues (*Stell v Pricett*, 2 Stark 466, per *Abolt* which a number of it is in substance. So in *Weeks v*

a multitude of per

in England this tendency of extending to private rights was checked by 2 B 809 (1850) and an arbitrary d private property rights was laid down. In that case he said "Reputation is not admissible in the case of such separate rights, each that, because there We think this positive

shire, 4 E & B 535, *Doe v Thomas*, 14 East, 323

But in America the result is otherwise. The earliest English practice had clearly been to admit reputation as to private titles, and it is therefore natural regularly admitted *Cas Ex* 421 note, of the principle is be so evidenced is

conceded *Ibid*

Old maps and old surveys so far as they have been used and resorted to by the community in dealing with the land, may be taken as representing, after the test of use and criticism, the settled reputation of the community as to the correctness of the tenor of the map or the survey. *R v Milton* 1 C & K. 62, *Hammond v Brad Street*, 10 Ex 390, *Pipe v Fulcher*, 23 L J Q B 12, *Daniel v Wilkin*, 7 Ex 429, *Bullen v Welch*, 4 Dow 297, *Smith v Earl Brownlow*, L R 2 Eq 252, *Ibuke v Berrington*, (1914) 2 Ch 303, *Freeman v Reed*, 4

32. *M & M 418; Curzon v. Lomax, 5 E-p 60; Doe v. Whitcomb, 1 H. L. C. 419, Carnation v. Vellebous, 13 M. & W. 313; Beaufort v. Smith, 1 Ex. 400, Wilford v. § 1592*

In *R v. Milton, 1 C. & K. 58*, upon the trial of an indictment against a parish for the non repair of a highway, where, in order to show that the road in question was not within the parish, a map was produced which had been made by a surveyor, from information derived from an old map, and out to him the boundaries, *Edlin J.* held that the old map's death, the map would be admissible as evidence to come from the chest of the parish.

Nort. Ev. 190

Clause (7) of section 32 does not declare all reputation to be relevant, but only that which consists of statements contained in a deed, will or other document relating to any transactions.

modified, recognized, a sort of existence. The clause therefore evidence of reputation in it are admissible under this clause, judgment and decrees are not in the least important. *Field Ev. 6th Ed. 11*

703. But where the question is as to the *Bhakti* system of rent, and the evidence is that in a *hebanama* executed by a tenant's deceased grandfather, held that the *hebanama* was inadmissible in evidence under s. 32 (7) read with section 13 (a) of the Evidence Act. *Bansi v. Mir Amir, 11 C. W. N. 703*

present plaintiffs and by the suit. Held that the deed though they could themselves admit it, the custom as against the defendants must be proved. *Hurronath v. Nittanand, 10 B. L. R. 263*

Ancient possession. In England the rule has always been that proof of

things and the finding them in such a place is a presumption they were honestly obtained, and reserved for use and are free from suspicion of fraud.

Doe v. Pulman, 3 Q. B. 622. In *Malcolmson v. O'Dea, 10 H. L. Cas.* laid down that the true ground for admitting a lease is that it shows an act of ownership. Thus, the production from proper custody of an ancient lease granted by A is evidence of an act of ownership over the land by A at that date, and is presumptive evidence that he was then owner in

also Blandy-
to prove a
licences on
Rogers v.
rights

to which they refer *Heath v Dane*, (1905) 2 Ch 678. Entries in old parish books are admissible as evidence to prove who were the owners or occupiers of the property at a previous time *Smith v. Andrews*, (1891) 2 Ch 678; *Powell* p 287 So it is clear that the existence of a document of ownership of land (a deed, lease, or license) may be evidence that the maker of the document had occasionally said that the incorrect These documents thus explained by Lord m 641, 653, 688; "Old being evidence of facts of at a distant d a person reasonable

law permits ancient documents, either with or without evidence of ancient payment of rent, to be given as evidence from which the jury may properly draw an inference that there was such possession For in the ordinary course of things men do not make leases unless they act on them, and lessees do not payment of rent adds

laid down the reason
always attended with
acts of ownership

That rule is, that ancient documents coming out of proper custody, and purporting as a lease or a license, payment of rent under f of possession This it possession is proved

to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate And certainly in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right any number of mere pieces of paper or parchment purporting to be leases or licenses ought to be of no avail It may be a question whether the absence of proof of enjoyment consistent with such document goes to the admissibility or only to the weight of the evidence,

look at this document you find it contains a great deal It shows upon the face of it that *Jenkins* must have been in possession or else he would not have brought an action of trespass He speaks of trespass the word is used in the document itself. It is not an act of ownership, I agree, but it is a document

S. 32.

possession against
admission of
This doctrine, how-
ever, does not
adversely affect
except the document
Lson v Wood

5 T. R. 112; *Rogers v. Allen*, 1 Camp 309; *Doe v. Asher*, 10 East 520, *Co. v. Coether*, M. & M. 393; *Doe v. Pulman*, 3 Q. B. 622 *Wigmore* § 157

Other cases. A deed of mortgage containing an assertion of title as

from in all the High Courts in
Pota, 25 Ind. Cas. 747 = (1914) M.
Ind. Cas. 149 = 14 C. L. J. 467

and with transactions affecting
of certain lands as *malik* or
brahm title in the will
case, which was not *inter partes*, was not admissible in evidence under section 32 (7) of the Evidence Act read with section 13 (a) and that the recital in the judgment not *inter partes* was not evidence. *Satindra v. Krishna*, 36 Ind. Cas. 883; *Basi Nath v. Jagat Kishore*, 35 Ind. Cas. 298 = 23 C. L. J. 583 = 20 C. W. N. 613. Where the validity of the will was in issue, the recital was

this clause. *Nagammal v. Santharappa*, 54 M. 576 = A. I. R. 1931 Mad. 115. If a settlement deed under which a promissory note is transferred to the plaintiff is admissible as secondary evidence, may be employed to prove the promissory note under s. 32 (7) read with section 13 (a) since a settlement deed constitutes a transaction in which a right was asserted. *Subba Rayappa v. Vengama*, A. I. R. 1930 Mad. 742 = 123 Ind. Cas. 107

CLAUSE VIII.

of this clause is that when a number of persons make a statement, which is a common statement, which is made in their minds at the time of the statement, and is made by the witnesses and is admissible on the general principle that they appear to be natural and sincere. Illustration (a) exemplifies this clause. This illustration is based on the case of *Du Esl* and *Bresford*, 2 C. L. J. 100. The impression produced on the defence, other spectators not being themselves put into the witness box, of the defendant's brother-in-law and the latter very handsome appearance, the fact that he received the money from the defendant.

impression produced by the picture on their own minds, viz., that it was intended

evidence that
Cool v Ward,

M & P 99, *Philp Ev* 332 In *Chase v Houell*, 151 Mass 422 (Am) notice of the rottenness of a tree's root was in issue, and to show knowledge by the city

in M
military
calling
statement

different places and afterwards put in second hand before the Court cannot be received as evidence under the clause *Queen v Ram Dutt*, 23 W R 35 Cr "It has been held that if a statement is made by several persons and any of them is dead, each of the persons must be taken to have made the statement for himself or herself and therefore the statement of the deceased person will be admissible under this section *Chandra Nilmadhab*, 26 C 236' *Field Ev* 7th Ed 234

the by standers, on seeing a caricature called out 'there is X,' and evidence is given of their words, what is relied on is, not their statements, but the fact of recognition; the fact, that is that the caricature at once recalls the person X to the minds of those who see it." *Mark Ev* p 34.

S. 33.

could not be admitted under the section. If they were not known or could not be found, it is not easy to see how the fact that there were many of them is material. In the English cases, it does not seem to have been proved that the persons who made the observations could not be called. *Cum Et Illa* Ed p 85

33. Evidence given by a witness in a judicial proceeding

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated

or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or, in a later stage of the same judicial proceeding, the truth of the facts which it states, where the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable;

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the means and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section

Principle The securities which have been devised by municipal law

by Betnam as confrontation *Betham's Rationale of Judicial Evidence* III, Ch XIX This was established long ago "The other side ought not to be

a case for us and a certain

In other words, this secondary advantage is a result accidentally with the process of confrontation, whose original and fundamental object is

It is no essential part of the notion of confrontation; it stands on no better footing than other evidence to which especial value is attached; and just as the

party.
attained
People v
W
tion ar
fied and
have b

remaining alive and actually examined in the cause" See also *R v Christopher*, 2 O & K 994, 1000 Its weight, however, is of course affected by the loss of the demeanour of the witness *Phip Ev 7th Ed 423*. Mr Taylor however considers it an exception to the rule excluding secondary evidence of documents, holding that the rule is wide enough to exclude secondary evidence of oral

48 (52), *Balgangadhar v. Shrinivas*, 39 B 441-19 C W N 729-42 I A 729 (P C)

The rule contained in this section is an administrative expedient for doing justice between litigants in a particular situation as a rational compromise between two well known canons of judicial administration. A presiding judge will require that a party within his power to do so be required to cause a witness admissible facts given on a

33. to the particular witness—It is not essential that the proponent also shows that he can prove the fact itself in no other way. The evidence being in its nature secondary, i.e., inferior in a probative point of view, less decisive and convincing than the face to face testimony of the witness himself, the party tendering the less probative proof must show to the reasonable satisfaction of the judge presiding at the trial that it is impossible for him to procure the attendance of the witness himself. This may be for one of several reasons. The witness may be dead, insane, sick, or absent from the jurisdiction. *Chamberlayne's Et* § 164

in interest, if criminal must retract
 person *McKelvey's Et* § 164. The chief reasons for the exclusion of hearsay evidence are the want
 cross-examine the wit
 judicial proceeding, in
 the power to cross-ex
 ordinary test of truth
 sible, of
 parties.
v Beal
 not dead
 insane,
 have been kept away by ill
 264, *R v Eriswell*, 3 T R
 all the objections which in
Wright v Tatham, 1 Ad &
E of Winchelsea, 3 C &
 Court new powers, which require to be
 no doubt that it is still necessary
 every witness at the trial, unless it is p
 produce him, or to be so difficult
 unreasonable to insist on its production." *Per Macpherson J* in *Wm v*
Moujan, 20 W R 69 Cr., *R v Piyari*, 4 C L R 511, *R v Alford* 1883
 648. In England the law on the subject is thus stated: "Agreed in the
 case, where a person has been examined in chancery, that in a cause at law
 between the same parties his deposition may be used in evidence if it can be
 proved that the witness was not able to

ers what the law requires
 and could not be read at law
 that the witness could not
reus v Palmer, 1 Vea. & B. 27
 ns taken in a former proceeding
 It specifies what evidence is

receivable. This is, whatever is delivered
 proceeding or (b) before any person.
 Oral evidence therefore is as receivable as
 deposition. *Not Et* 194

The deposition of a witness is not admissible under section 30 of the
 Evidence
 The mere
 of the defence
 admitting the prior deposition. *Brayaballav v Akhoy*, 30 C W R 111, 1 L R 110-
 Cas. 115-A I R 1926 Cal 705, *Ghulam Haider v Emperor*, 1 L R 110-

S.

L. J. 205 Deposition in a civil suit is

can only
 an absent v
 could be extr
 In the
 Evidence Act,

right and opportunity to cross examine and the questions in issue were substan-
 tially the same in the first as in the second proceedings *Chakauri Singh v*
Suraj Kuar, 2 A L J 91. If that fact is a statement made by a person who is
 not called, or cannot be called, the statement cannot be admitted unless it

78 Ind Cas 178 The Sessions Judge before transferring the deposition of a

section a party's deposition in a previous suit can be used against him in a

THE INDIAN EVIDENCE ACT.

S. 33. subsequent suit as his admission. *Soojan v. Achmat*, 21 W. R. 414, *Asst Moharaj*, 36 C L J 186; *Exp Hall*, 19 Ch. D 583.

Relevancy. Even where primary proof is practically unavailable, the secondary actually offered is not necessarily admissible. It must, in addition, be relevant. It is essential that the fact tendered in evidence as secondary proof be relevant, both objectively and subjectively, to the existence of some *res gestae* or constituent fact. *Morgan v. Nicholl*, L R 2 C P 117. Objective relevancy, being in the matter of natural law, of the reality of things, is assumed and but little classified or, indeed, discussed. Subjective relevancy is however more carefully scrutinized, in its two essential requisites of adequate knowledge and absence of controlling motive to misrepresent. When these admitted, relevancy and Relevancy are not introduced secondary evidence which was not relevant evidence in the second proceeding.

Small v. Narain, (1819) 13 Q. B 840.

Waiver

A competent

injection is that of a witness received at a trial, they cannot be excluded subsequent trial. In the same way, an observer, "expert" so called, on a fact it cannot be rejected as improper in its admissions, on a subsequent trial. *Chamberlayne*

presiding judge to be further invited in the

It will be remembered that it is frequently a loss to the cause of justice and the rights of the opponent should be made within reasonable time.

Objections

He acknowledges the fact upon his testimony might, and shall stand under oath, and shall be a falsehood.

Small v. Narain, 13 Q. B 840; *Small v. Welsh*, 17 Mass 160 (1867). The opponent can take objection to leading questions (*Small v. Narain*, 13 Q. B 840); hearsay (*R v. Crook*, 71 J P Rep

152); or statements of the contents of unproduced documents (*Stein Keller v Newton*, 9 C & P. 313; 319; *Tufton v Whitmore*, 12 A & E 370), *Phip Ev*, 7th Ed. 425.

to judge its propriety. *Mol*
Cal 756=32 Cr L J. 233,
that under this section the

In order to enable
the ground for its
ble the High Court
I. R 1930
It is necessary
in admissible

and fast rule for the application of this section. Each case must depend upon its own facts and the matter is essentially one for the exercise of the discretion on the part of the presiding Judge. *Jati Mahi v Emperor*, 33 C W N 1215

Affidavit An affidavit of a person who died subsequently and who has not been subjected to cross-examination is not admissible under ss 32 and 33 of the Evidence Act. *Doraiswami v Balasundaram*, 38 M L T (H C) 275=102 Ind Cas 243=A I R 1927 Mad 507=52 M L J. 477, see also *Mir Abdul v Musst Bibi Sona*, 2 Ind Cas 897

jointly tried,
on B and the
ee witnesses
not a party to
ist, with his
is not really
witnesses is
Abdul Gaffor
I R 1929
117, *Ponnu*
am v Umar,
consent. So
admitted in
ch witnesses

are alive. *Lakshmi devamma v Krishnah*, 39 M L T 198=104 Ind Cas 518. Any irregularity in the admission of such evidence is cured by consent of the parties. *Radha Krishen v Kidar Nath*, 22 A L J 761=L R 5A 536=48 A 815=80 Ind Cas 874=A I R 1924 All 845, *Pannuswami v Shegaram*, 41 M. 610. The provisions of this section are intended for the benefit of a party to a suit and he may waive their benefit at any rate in a civil is involved. *Jamab Bibi v Hyler* T 23=56 Ind Cas 957=1920 M *Gopal*, 24 B 591=2 Bom L R 924, J 1. But that is not the rule in criminal matters. *Kottammal In re*, 69 Ind Cas 636, see also *Reg v Bernard*, 4 Moo P C N S 460, *Queen v Bushnath* 12 W R Cr 8, *Deputy v Upendra*, 12 C W N 140; *Mokshed v Emperor*, A I R 1930 Cal 756; *Ghillum v Crocen*, A. I R 1929 Lah 542; *Annani v E*, 39 M 449

33. Case, the evidence was rejected, because the witness could give the effect only and not the words. But it may be doubted whether such minute particularity is requisite, for the very words could seldom be remembered after a lapse of time. Where a note has been made by a reporter or a short-hand writer he could of course use the note. . . . short-hand writer might . . . A & T 275. *Nort Ex* . . . prove what is de ceased . . .

put at the head of a deposition, form no part of it and are no evidence to prove the facts stated. *Magbula* . . . N 241-6 Bom L R 238, 1 . . . 357; *Chalor v Emperor, A.* . . . v *Abdul*, 50 Ind Cas 431. . . sition, the identity of the pe . . . *ballav v Akshay*, 30 C W N 254

of . . .
sat . . .
of . . .

while a written record of what is said abides *Litera scripta manet*. Some forceful remarks on the superiority of written over oral testimony will be found in the case of *Bunwara Lal v Maharanjah Hejnaram*, 7 M. L. A 156; *Nort Ex* 194.

Judicial Proceeding. The evidence taken in the proceeding before the revenue authorities (Court to recover possession by pei in the revenue Court. *Saru Khar* 1928 Lah 43. Where certain who had no jurisdiction to conduct a proceeding is inadmissible on a retrial before a competent Court. *Buta v Crown*, 27 P. L. R. 447-7 Lah 396-97. Ind Cas 752-27 Cr L J 1163-A 3 M 48; see also *Empress v* 694. The evidence taken in the conditions and for the purpose 33, previous evidence is re, the person gave the

Nga Pu, 22 Ind Cas. 675-7.

completed. The moving party may have abandoned the proceedings. *Chamberlayne's Ed* § 1652.

Before any person authorised by law. It is not necessary that the evidence should have been given in a judicial proceeding. Any deposition taken by a Magistrate in his ministerial capacity could be receivable, if not excluded on any one of the grounds mentioned in the section. So a deposition taken before a Coroner (*R v Rig*, 4 F. & F 1985; *State v Campbell*, 1 Rich 124, R. v *Law* 61 J P. 608; but see *R v Cowle*, 71 J P. 152), a British consul of Zanzibar (*Empress v Dossay*, 3 H 334), a Special Registrar (*Jeheto v Jaifanessa*, 18 C W N 605. *Jeheto v Jaifanessa*, 20 Ind Cas 661; *Lanka v Lanka*, 42 M. L. C. 100) an arbitrator (*R v. Amanulla*, 12 B. L. R. App. 15), or a Comm.

appointed under Civil Procedure Code to take down evidence (Civil Pro Code, Order XXVI), a revenue officer in a mutation proceeding (*Mamta v. Wazir*, 65 Ind Cas 308), is admissible in a subsequent case So noted by a Court which *Keraga*, 54 M. 561 In n by the Commissioner *Nundo*, 2 C W N. 239; C W N 794) but in

compel or not in practice employing cross examination as a part of its procedure
rd the
er its
ration
Judge
As

one of the constitution of Courts and their officers *Wigmore* § 1376 "It is sufficient if the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination" *Chamberlayne's Ev* § 1652

law
law.
and
4-17
of Civil Procedure Code lay down the rules which must be observed in taking down depositions in civil cases When any deposition is taken in accordance with law, the Court shall presume that the document is genuine (*Vide* s 80 of the Evidence Act) See also *Dosghat v Emperor*, 52 C 490, *Emperor v Phaguna*, 89 Ind Cas 1043

When the witness is dead Evidence given by a witness in a previous action
proceeds
Steph
deceit
evident

Wigmore § 1103, *Gilbert's Li* 60, *Lord Morley's Case*, *Kelying* 55, *Fry v. Wood*

33. 1 Atk 441, *R v Castro* (Trichborne Case), charge of Chief Justice, II 40. Such depositions cannot be admitted in the subsequent suit when the witnesses are living and their evidence is procurable. *Hurish v Tara Chand* 2 B L R App 4; *Chakauri v Suraj*, 2 A L J 91. *Bhoobun Moyee v Ambica* 23 W R 343, *Mahomed v Iatan*, 1. The evidence of witnesses given before a Magistrate, if fresh charges have been added. *Empress v*

Li is well. *Chamberlayne* § 1634

Absence of a witness permanent, and such as to prevent the deposition upon him may be a sufficient justification.

French, 2 C & K 1008. The deposition by a person where he denied on oath that he had presented a certain petition in Court which purported to be from him is held to be inadmissible as evidence when such person might have been brought into Court, but was not. *Bhoobun Moyee v Umbica*, 23 W R 343.

Illness. Illness, by causing inability to attend has the same effect as death. *Lord Morley's Case* *Kelvin v Wood*, 1 Atk 415. *R v Savage* 5 C & P 143, *Ro contra Doe v Evans*, 3 C & P 1. The phrase usually employed as the application of the principle should be left to the trial Court's discretion. *Thornton v Britton*, 144 Pa 130. *Gre v*

eed only be in probability such that the trial cannot be postponed is a question for the determination of the Judge. *K. B 531, R v Stephenson*, L & C. 1885, 11 Q B 188. *Stephenson*, L & C. 1885, 11 Q B 188. *Stephenson*, L & C. 1885, 11 Q B 188.

mined testimony or deposition, and would probably be much less. *Mathews J in Miller v Russel*, 7 Mart N S L 369. *Higmore* § 1408. *also Fry v Wood*, 1 Atk 445, *R v Savage*, 5 C & P 143; *R v Harris*, 4 C & P 440, *R v Harney*, 4 Cox C C 441, *R v Ullmer* 4 Cox Cr 441, *R v Stephenson* 9 Cox Cr 156, *R v Bull*, 12 Cox Cr 31, *R v Welton* 9 Cox Cr 156, *R v*

his previous deposition was not admitted. *R v Thompson* 15 Cox Cr 606. A temporary illness will not excuse attendance and examination of a witness. *Empress v Pyaralal*, 4 C L R 501, *Empress v Ashgur*, 11 C 774=8 C L R 124, *Harrison v Blade*, 3 Camp 457. *R v* 5 C & P 143, *R v Tail* 2 F & F 533, *R v Wilson*, 12 Cox 622.

Cannot be found. Inability to find the witness is an equally sufficient reason for non production, by the better opinion (*Oate's Trial*, 10 How 4. *Tr* 1285, *Anon*, *Godbolt* 236; *Gilbert Evidence*, 60, *Buller N P* 239, *The*

State, 33 Ark. precedents (*Lord Scaife*, 8 Q B is usually and If the witness or the purpose by the party's to recognizing ween party and been no collusion force *Wigmore* "dead to him"

on *Godbolt*, 326 This principle has also been accepted by *Jeffreys L. C. J. Oates Trial*, 10 How. St Tr 1237, on the assurance of *Oates* to the effect, I cannot any cannot when

ent and unsuccessful search
1, *Wiedemann v Walpole*,
But in England the above
R v Scaife, 17 Q. B 238;
v Austen, 7 Cox 55, *R v Hogan*, 8 C & P 167; *Phip Ev* 7th Ed. 425.
it in India there is no difference between civil and criminal cases.

Insanity]
R 707; *Mor* . . . *miscell*,
37 A
Court
estimony or
r & M 147
nd and the
Even tem-
& M 147

also renders
7 *Gallagher*,
1 Pa 112, *Cent R Co v Murray*, 97 Ga 326, *Ewing v Duhl*, 76 Pa 373;
rayton v Wells, 1 N
ve the same eff
Pa 378; *contra*,
6, *Greenk Ev*
tified of the fact
order that this
no dispensation
se the deposition or report the testimony as a record of past recollecti
Wigmore § 1409; *State v N O Water Works Co* 107 La 1; *Jack v. Woods*, La
a 378; *contra*, *Cool v Stout*, 47 Ill 531; *Stearns Lumber Co v Houltell*, 12
E 217.

Loss of faculties necessary for testimony The same result follows
a witness loses his voice (*R v Cockburn*, 7 Cox Cr C 265), hearing (*R v Cockburn*, *supra*), eye sight, so far as necessary for the examination of documents
Ginsman v Crooke, 1 Ld Raym 1166, *Hoaston v Blythe*, 60 Tex 46; *Wigmore* § 1108. Where evidence was given before a committing

S. 33. but in the Sessions Court the witness proves shy and speechless, this does not apply to the case and the evidence cannot ipso facto be treated as evidence at the Sessions *Moti Ram v. Emperor*, 75 Ind Cas 152-4 C L J 901.

Incapable of giving evidence The capacity to give evidence mentioned in section 33 of the Evidence Act need not be a permanent one; something of permanent incapacity might satisfy the words of the section "incapable of giving evidence" *In the matter of the petition of Asgur Hossein*, 6 C 774 C L R 124, but see *In the matter of Pyari Lal* 1 C L R 504, where it was held that the words "incapable of giving evidence" in section 32, Evidence Act, denotes an incapacity of a permanent kind. The Court has no doubt

if it is proved to be either actually impossible to produce him, or so difficult to do so, or if it is unreasonable to insist on his production. *Is it matter of Pyari Lal, supra*

Kept out of the way by the adverse party If the witness has been

case where three prisoners were indicted for felony, and a witness, one of them, the Court against the man who had against the other two men *R v Scarfe*, 2 Den 281-17 Q. B. 238-5 Cox 243 S C, *Ex parte Larlin*, 1 Arn M & O 403, see also *Lord Morley's Case*, 6 How St Tr 651; *R v Harrison*, 12 How St Tr 851; *Green v Gatewick*, B N P. 473; *R v Gutteridge*, 9 C & P 473; *Taylor* § 478. The proposition that a witness be kept out of the way by the adversary, his former statement on oath will be admissible, rests partly, on the authority of several decisions both in civil and criminal Courts, partly on statutory analogy but chiefly on the broad principle of justice which will not allow a party to take advantage of his own wrong *Taylor* § 478, *Green v Gatewick* § 163(g); *U S v Reynolds*, 1 Lush 322 Where it appeared that the witness who was related to the accused was absconding and the statement as part of the evidence in *3 Abbas Mandal v Emperor*

131 Ind Cas 855-35 C W N 143-A. I R 1931 Cal 473
Proof of unavailability of the former testimony of the former witness
 or the deposition is of course inadmissible in consequence of the former testimony being offered, *U S v Reynolds* § 163(g)

J in Dunn v Dunn, 11 L. process of the Court, his previous deposition is inadmissible. *Blagrove v. Blagrove*, 1 Deg & Sim 252, 259 Under this section, the evidence of an absent witness taken in the Magistrate's Court cannot be received in the Sessions Court without proof of the circumstances which make it admissible. Such circumstances should be proved like any other fact by the evidence of witnesses and a mere report that a witness is dead or absent is not sufficient

Queen Empress v. Nag Po, L B R (1872—1892), 134 *Khem Singh v Emperor*

S. 3

dia and an argument based on the
here *Alyan v King-Emperor*, 31 C
766—A I B. 1927 Cal 679, R v
oakes, (1917) 1 K 581, but see R v *Cohen*, 34 L J. 623 A previous
position can be admitted in evidence only under the provisions of
of the Evidence Act, but before it can be placed on record of a criminal
d been made on
at in spite of
or that he was

incapable of giving evidence,
r his presence could not
high, under the circumstance

Thulam v Emperor, A I R 1929 Lah 542; *Annau v Emperor*, 39 M 449—
e v *Emperor*, A I R 1929 Mad 32=46 M. 117;
u 437—A I R 1925 Lah 418, *Emperor v.*
Crs 161=15 Cr L J 713, *Falconer v Hanson*
pole, 1891 Times, June, 15, *Bishan Das v. Ram*

06 P R 1915.

Official duty etc Inability on the part of a witness to attend a trial
owing to requirements of official duty, will usually be deemed sufficient adminis-
ry evidence of his former testimony

ing the attendance of the official wi
1407. But in India such evidence will not be admissible when he can be
examined on commission

Presence cannot be obtained without an amount of delay or expense
It is only in extreme cases of expense or delay that the personal attendance
of a wit
prisoner

, in the absence of special
able Per *Phear J* in *Queen*
ness is no ground allowed
4 What delay or expense is
stances of each case Of
the circumstances of the case, one of the chief which the Judge has and ought to

exists, or
for which
with essces are produced at the trial Per *White J* in *In the matter of Pyari Lal*
4 C L R 504 (509—510) But where the absence of the witness is due to
temporary causes, his previous deposition cannot be admitted *And* The more

actually impossible to produce him, or to be so difficult to do so, or if it is
unreasonable to insist on his production *In the matter of Pyari Lal*, 1 C. L. R.

3. 33. 534; see also *Asiatic Steam Navigation v. Bengal Coal Co* 35 C 751; *N. B. v. Emperor*, 104 Ind. C. 637—A. I. R 1927 Rang 249; *R. v. Hogg* 6 C & P 176; *Beaufort v. Crawshaw*, L. R 1 C P. 639. *Empress v. Ramu Kishi*, 3 W. R. 176. So where a witness is procurable his subsequent deposition is not admissible. *Bhoobon v. Ambica*, 23 W. R. 343; *Emperor v. Nandu*, 2 A. L. J. 509. The whole notion of taking depositions is that they are a provision in advance for obtaining testimony from one who will not be available at the time of the trial, i. e., in the traditional phrase, they are taken *de bene esse*, conditional. If the witness is in fact available at the time of the trial, the principle of confrontation requires that he should be examined *in face* on the stand. This principle is constantly indicated. *Greenl. Ev* § 163(i) In certain States of the United States of America, such deposition is admissible where the personal attendance of witnesses would involve them in great pecuniary loss and involve a sacrifice of their personal interest without any person.

534.

A. I. R. Co v. Bussen, 30 C. A. 171. The notion that any witness has a duty to the community is not a principle of law.

Proviso—Para (1) At common law testimony given by a witness in a civil or criminal proceeding is admissible in a subsequent, or in a later stage of the same trial, in proof of the facts stated, provided that the proceedings are against a person not a party to the first trial.

That cannot be done for this reason because such person has it not in his power to cross-examine. *Gooding v. Moss*, Cowper, 592. So "examinations upon oath, except in exceptional cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them and where each has an opportunity of cross-examining the witness." *Per Lord Kenyon L. C. J. in R. v. Eriswell*, 3 T. R. 707. The law on this subject is thus summarised by Chief Baron Gilbert: "When you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross-examine." *Gilbert Ev* 68. So a deposition cannot be given in evidence against any person that was not a party to the suit; and the reason is because he had not liberty to cross-examine the witness, and it is against public policy to allow a witness to be examined in a cause to which he was not a party.

would have been more accurate if it had been "cross-examination and estoppel interest." Here the effect is the same as that of *res judicata* and estoppel. *Ev* 190. *res in interest*. In fact they are the same. *L. T. 510—101 Ind. Cas. 11*. *Acholl*, 2 L. R. C. P. 11. Parties, is really meant personal parties, is really meant personal parties, having different rights and with whom the plaintiff had no privity, and he had no opportunity to examine or cross-examine the witness it would be contrary to the interests by the parties being the same in this case. *Per Hunman C. J. in Lord v. Brainerd*, 30 Cox 171. *Gilchrist J* laid down by *Gilchrist J* testimony be given under oath in a civil or criminal proceeding against the accused is admissible in evidence in a subsequent or later stage of the same trial, in proof of the facts stated, provided that the proceedings are against a person not a party to the first trial.

igh the pros-cutor in the second case is the

Queen Empress v Bhabhutgar, Rat Un

To satisfy the requirements of this section the

unst the same parties or their representatives in

interest, at the time when the suits are proceeding and the evidence is given.

Sita Nath v. Mohesh Chunder, 12 C 627; *Queen v Ishri*, 8 A. 672=A W. N. 1886, 257.

Where the parties of the present suits were not parties or representatives of the parties of the previous suit, in such a case, a deposition made in the former

suit is not admissible in evidence in the present suit *Mrimoyee v. Bhooban*

Moyce, 15 B. L. R 1=23 W. R 42; *Queen Empress v. Ishri*, ■ A. 672 A W.

Bom L R 599 (601).

1 a former suit when

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hrs. *Ibid*

The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or

may not have an opportunity to cross examine the witness, yet the person in

lity could not be used by the defendant therein, "as a man who cannot be prejudiced by a deposition or proceeding in a suit shall never receive any advantage from it." *Gubb F.* 55; *Brown v Johnson*, 13 Gratt. 644; *Burr Jones* § 683.

both the proceedings *Morgan v. Nichol*, L R 3 C P 117, see also *Fool Assory v. Nobin*, 23 C 441, *Patunharluru v Raman*, 24 Ind Cas 519 "The requirement of identity" says *Prof. Wigmore* of parties is after all only an accident or corollary of the requirement as to the identity of issue. It ought, then, to be sufficient to inquire whether the former testimony was given upon such

though a different person, had the same property interest that the present

former evidence *Mutatis Mutandis*, the rule is the same where a party whose omission from the record fails to alter the issue or the opposing party's right of cross-examination has been dropped in the second case *Chamberlayne's Ev* § 1671

been satisfied *Moore v Triplett*, Va, 23 S E 69 So the general principle is that in all cases where the party has without his own fault or concurrence

Greenl. Ev 163(f) The doctrine requiring a testing of testimonial statements by cross examination has always been

or be shaken by cross examination declining, he has had all the benefit of examination of that *Moule*, 1 Drew 472, law is that no examination of both examine and has if he had cross-examination opportunity of *Vaughan*, 1 M. & S. 6, *Empress v Jhuba*, 8 C. 739.

S. 33. "A deposition is considered a partial representation of fact, as to all parties who
Per
Dr

taken in former suit depends upon the fact that the adverse party, or those privy with him, had the opportunity, to cross-examine the witness, if it appears that the deposition was taken without authority, or without the sanction of the court or without such chance of cross-examination it should not be received.

proceeding provided that the adverse party in the first proceeding had the right and opportunity to cross-examine. That the accused had the opportunity of cross-examining this witness, is I think quite clear. He was asked to do so but he refused to do so. But I think it is also clear that at the stage at which the case had arrived he had no right to cross-examine. Now as far as I can see the accused in a warrant case has no right to cross-examine the prosecution witness until after the charge is framed... No doubt s. 256 (Cr. Pro. Code) does not prohibit cross-examination at a previous stage but that is not the same as saying that the accused has any right to cross-examine. I am of opinion that no such right is reached the accused has no right to cross-examine in the present case the accused had no right to cross-examine.

under s. 33" But in *Manjal*, was examined by prosecution the charge it was discovered unable to answer the charge.

must also be right to do so. *Das Bahadur v. Bijai Bahadur*, A. I. R. 1934 C. F. 9-21 C. W. N. 260. In this case the court held that the accused must also be right to do so. *Das Bahadur v. Bijai Bahadur*, A. I. R. 1934 C. F. 9-21 C. W. N. 260. In this case the court held that the accused must also be right to do so.

is dead and the opposite party had an opportunity of cross-examination though he did not avail himself of it. *Tafiz v. Emperor*, 50 C. L. J. 541 (Calcutta).

but was not cross-examined by the defence, his deposition is admissible under s. 30 in the Session's trial, even when the Sub-inspector dies during the Session's trial. *Tafiz v. Emperor*, 50 C. L. J. 541 (Calcutta). A deposition taken in an *ex parte* proceeding cannot be used under the section in a subsequent contested proceeding between the same parties.

where other conditions of the section are satisfied *Raj Mungal v Mathura*, 13 S. A. L. J. 881.

, if not admitted, must be proved, before

3 The deposition of a witness obtained and forming part of the Evidence Act, provided *Empress v Ram Chandra*,

19 B 749, see also *Queen Empress v Basvanta*, 25 B 168=2 Bom L R 761

In an enquiry under Chapter XVIII of the Criminal Procedure Code, a witness was examined by the prosecution but he was not cross examined by the

accused had the opportunity to cross examine a witness examined by the prosecution, where the accused did not cross examine any of the prosecution witnesses, and was not asked by the enquiring Magistrate to exercise his right of cross-examination *Ibrahim v King Emperor*, 17 C W N 230=18 Ind Cas 406=14 Cr L J 70, see also 2 Weir 755 Deposition of a witness can be taken in the absence of an accused who has absconded When such a deposition is to be used in a subsequent case, it is necessary to establish that when that deposition was taken, the accused had absconded, and after due pursuit could not be arrested *Queen v Eluarce*, 21 W R Cr 12, *Queen Empress v Sahib Singh*, A W N 1896, 182, see also *Ghurbin v Q E*, 10 C 109

Failure of cross-examination There may have been an adequate opportunity of cross-examination, so far as depends upon the nature of the tribunal or

stances preventing adequate cross examination *Wigmore* § 1390

S. 33.

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oath, or without such chance of cross-examination, it should not be admitted although if due notice was given, it is not necessary that any cross-examination should have been actually made. *Fitzgerald v. Fitzgerald*, 3 Swab & T 5 (1877) also *Lawrence v. Maule*, 4 Dr 179; *Macmillan v. Inton* 6 M & G 27 (1811)

33, Evidence Act, the statement of a witness, if relevant in a subsequent proceeding provided that the adverse party in the first proceeding had the opportunity to cross-examine. That the accused had the opportunity of cross-examining this witness, is I think quite clear. He was asked to do so, he refused to do so. But I think it is also clear that at the stage at which the case had arrived he had no right to cross-examine. Now as far as I can see, the accused has no right to cross-examine the prosecution witness at the stage but that is not the same as saying that the accused has any right to cross-examine. I am of opinion that under the stage of the case provided for in s 256 is reached the accused has no right to cross-examine. That being so in the present case the accused had no right to cross-examine. Mr. Value is not admissible in evidence.

dur v. Bazar Bahadur, A 1 (1929) where 510, 511

adverse party had both the right and the opportunity to cross-examine. So a deposition of a witness is admissible under this section when the witness is dead and the opposite party had an opportunity of cross-examining him though he did not avail himself of it. *Ind Cas 743=A I R 1929* *Q E v Ram*, 19 B 749

524=A I R 1929 208 of the Cr P Code is not admissible under s 30 in the Session's trial, even when the Sub-Inspector died before the Session's trial. *Tafiz v Emperor*, 50 C L J 534=A I R 1904 228 A deposition taken in an *ex parte* proceeding cannot be used under this section in a subsequent contested proceeding between the same parties.

opponent is also entitled to cross examine the interpreter so as to test the correctness of the translation, and to call other witnesses to verify the interpretation. *Wigmore* § 1393

Whether the deposition of a witness who cannot be cross-examined on account of some organic defect, such as defects of speech, hearing or the like, should be admitted in evidence, it is for the trial Judge to decide. *Quinn v. Halbert*, 55 Vt 228. The same principle also applies when the accused is deaf or dumb or blind. *Bells v. Murphy*, 201 U. S. 123; *Wigmore* § 1393

Sundry insufficiencies of cross examination Where a party is absent from the Court at the time of the cross examination, but his counsel is present, he can . . . a witness Still in such . . . Co. 429, 133 But such a witness taken in his absence is read over to him and liberty is given to him to cross examine the witness. *R. v. Smith*, R & R 374; *R v. Forbes*, Holt, 599 In *R v. Hoke*, 1 Cox. Cr 226, *Earle J.* said: 'The reading of it in the prisoner's presence is equivalent to the taking of it in his presence' The object is to afford to the

ibid Failure to take advantage of a known opportunity for cross examination affords no ground for modifying the opinion that the party in question had no assistance such an opportunity for cross examination, be a very barren privilege. Nor is it to be regarded as embarrassing by the absence of his lawyer and was not afforded an extended time in which to exercise the option to cross examine personally. The existence of such infirmative consideration is not deemed inconsistent with the reception of the evidence upon a subsequent trial. Where the party to be affected by the secondary evidence has announced an intention to take no further part in pending proceedings, subsequent tender of opportunity to cross examine is regarded as having been expressly waived.

cross examine Where a witness leaves the country after the charge and before the trial, his deposition before the Court is admissible. *Nga Da On v. Bur* L J 114-A I R 1927

Section 33 whether controlled by s. 350 The general provisions of section 33 of the Indian Evidence Act are not in any way affected by section 350 of the Code of Criminal Procedure. *Lal v. Crown*, 101 Ind Cas 183-28 P. L. R. 199-28 Cr. L. J. 451-A I R 1927 Lah 332-8 Lah 570

an opportunity of examining and cross-examining on the very point on which their evidence is adduced in the subsequent proceeding. Though separate proceedings may involve issues, of which some only are common to both, the evidence of those common issues given in the former proceedings may, on the conditions mentioned in s. 33 arising, be given in the subsequent proceedings. *Ram Reddy v. Seshu Reddy*, 3 M 43-2 Weir 756-2 Weir 451. Unless the issues were then the same as they are when the former deposition is offered, the

s. 33. cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposure of inaccuracies, and falsehoods *Wigmore* § 1386 It is absolutely necessary that the former statement was sufficiently tested by cross examination upon the points now in issue. It is sufficient if the issues were the same or substantially the same.

R v D-J 7 C 12-8 C L R 273, Wig 1387
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in
Dos v Foster, 1 A & E 791; R v
6 Cox Cr 52; R v Beeston, 6 Cox Cr 1
Castro, Trichborne Case; Brown v. Whit, 12 Cox Cr 1
2 Cr App. 257, Wigmore 1387 And the same rule holds in criminal cases thus a deposition on .

grievous bodily harm, facts *Phap Fv 7th Ed 124* citing, *R v Smith, Rus & W. 12 Cox Cr 4 F & F 63, R v. Beeston, 24 L J M C 5, R v. Dilmore, 6 Cox 52, R v Williams, 12 Cox 101*

In *R v Beeston, 6 Cox Cr 425*, deposition of a witness on a charge of intent to do bodily harm, was admitted on a trial for

he would not same case, and has had full opportunity said. "The question circumstances that the situation" says *Prof* in the application of the rule, and not a narrow and pedantic view of the whole the judicial already adequately *Wigmore* § 1387 the same, it is always a useful test to see whether the same evidence will prove the affirmative of the issue in both *Field Ev 6th Ed 149, Wordroffe Et 1 Ed 356, R v Rochia Mohala, 7 C 42-8 C L R. 273, Dos v Foster, 1 A & E 791*

Depositions of deceased persons are not admissible under s 33 of the Evidence Act unless the subject-matter of the dispute in the two suits is the same and also the subsequent suit is between the same parties or their representatives in interest *Ward v. 24 Ind Cas, 870* suit under s 9, Act at a former case since dead, is admissible *23 C 441*

the purpose of excluding

Markby Ev p 33.
 and on behalf of F
 own behalf for these charges F
 of the same house under section
 institution of the civil suit

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustrations.

A sues B for Rs. 1000, claiming that B is indebted to him for Rs. 1000, without other evidence.

Principle. "The reasons justifying the admission of this class of statements are not as clearly defined by the Judges as in other Hearsay exceptions § 1522. It has already been stated as an exception to the Hearsay rule, -

circumstantial guarantee of trust-

On the face of it, in this class of

In such a case the situation is

nowhere, even though a desire to state falsely may casually have subsisted,

related motives which
probable trustworthiness
habit and system

real inaccuracies and to counteract

since the entries record a regular

course of business transactions, and error or misstatement is almost certain to be detected and the result disputed by those dealing with the entries; misstatements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification. As a rule, this fact (if no motive of honesty obtained), would

8 Ind. Cas 81-13 C. L. J. 139.

"It is recognized that to use a system of regular accounts to sustain a

S. 34.

In case

... as a party's own kind of evidence ... witness for him ... evidence obtainable from others, certain past statements of his must be admitted by very necessity. Thus the principle of necessity and the principle of circumstantial guarantee were both recognized.

... rule was established before it ... therefore be understood only by keeping Courts in establishing it was precisely more § 150 admissible

in the affairs cases the book it being practi

... of a completed transaction. *Chu*

... motives for untruth and adding certain ... *Per Tindal C. J. in Peole v. Peole* 1 Bing N. C. 6

... were living or dead. But there was more abuse of this evidence in "leaving the books uncrossed and any way discreditable and still suing for the claim; moreover, the whole proceeding was also paraged as involving the making of evidence for one's self, for 'the rule is a man cannot make evidence for himself.' In 1603, Stat. Jac. I. C. after reciting these considerations, forbade this use of shop books 'in action for any money due for wares hereafter to be delivered or for

hereafter to be done," except (1) within one year after the delivery of the wares or the doing of the work, (2) where a bill of debt existed (3) between merchant and merchant, merchant and man," for matters within the

1 C 4 § 22 and 16 Car I

that a man cannot make evidence complete, by refusing to recognize these books at all, after the expiration of the year. In the lower Courts, where the jurisdiction was limited to small used (*Vide Thayer, Cases on Evidence, the historical material*), and a recent (to an extent somewhat indefinite) in the upper Courts (Rule of Court, 1853, Ord 33, R 3; Ord 30, R 7 as amended by Rules of July, 1903) But before the end of the century of the above Statute,

where there was such evidence (entries) by a servant known in transacting the business, such entry, from time to time, re that servant, the servant or agent usually employed in such business, was intrusted to make such entries by his master, (and) that it was the course of trade,—on proof that he was dead and that it was his hand-writing, such entry has been read (which was *Sir Baby Lake's Case*) And that was going a great way, for there it might be objected that such entry was not by reason of the fact that it was gone so far," but already *Williams, Comb v. Perke Add* and, 3 B & Ad 890, the matter was placed as of the exception was understood as since deceased, in the ordinary course of the entry unconnected with the parties, or the clerk of a party, or a party himself *Greenl Ev § 120b*

S. 34.

the books of merchants and tradesmen regularly kept and written from day to day, without any blank, when the tradesman has the reputation of probity, constitutes a semi proof and with his supplementary oath are received as proof to establish his demand. *Green v. 119 cited in Taylor § 712* The doctrine is familiar in the law of Scotland, others, kept with a certain reason Court, may be received in evidence, in supplement of such imperfect proof. It seems however that this is true of other

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probatio,

273—277,

evidence of a debt being due to him by entries, whether by himself or in his own books, provided the books have been regularly kept in the course of business. *Cum v. 10th Ed 175*

therein" So, even by that Act a man was not allowed to make himself by what he chooses to write in his own books behind the back of the parties. But where there was other independent evidence of the truth of a transaction to which the accounts referred they were admissible as corroborative evidence, provided the books were first shown to the satisfaction of the Court to have been regularly kept in the course of business. *Nort v. 193*, see also *Duarka Doss v. Janktee Doss*, 6 M. L. A. 88. But such books could not be used as independent evidence. *Ras Sri Krishen v. Ras Hurry Krishen*, 5 M. L. A. 4. *Duarka Doss v. Darika Doss*, 2 Agr 303; *Ramkrishna v. Hurrydo*, Mar 1899; *Jagan Koor v. Raghoomundyn*, 10 W. R. C. R. 148; *Allyat v. Jugul Chund*, 6 W. R. C. R. 242, *Seth v. Seth*, 13 W. R. (P. C.) 36; *Sorabjee v. Annamayi*, 2 W. R. 29 P. C., *Gopal Mundal v. Nabho Krishen*, 5 W. R. Act X Rule 30. Account books are legal evidence to corroborate oral testimony. *Rajnarayan v. Olivia*, 5 W. R. Act X Rule 30, *Ram v. Hurry*, Marsh 219—1 Hay 23. *Ind Jur N. E. 11*

fraud, it must be considered binding upon him. *Gopce v. 2000*
N S 358

Books of accounts as evidence—American rule. "The 'shop book' rule is that by which shop books and tradesmen's books of account, regularly and fairly kept as books of prima facie evidence, are admitted in evidence. The rule is regarded to the admission of very old ones by the law."

going into the history of the admission noted that the origin of the shop-book administered in this country was it seems, but from the law of Holland. . . It has long been the settled law

that entries made in the regular course of business in shop-books by the clerk or agent of a person are, with proper restrictions, admissible in evidence after the ruling... It has long been the

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In many of the states statutes have
been entered
account in
parties to
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may be in
them, since

states that books of accounts regularly

selves to charge any
rated they are still
missible They are
books of accounts are
reason with liability
It would be more correct to say that though admissible they do not establish the
facts required to be proved, i.e., that a person owned a certain sum of money,

present section
instances with no previous ruling
an entry relevant under section 34 and one relevant under section 32, cl (2) is
that in the former case the person who made the entry may be available as a
witness while in the latter case he is not. I find it very difficult to appreciate on

Sridhar, 28 B 294 and has been accepted as correct in *Daji Bhai Kharis v Govil*,
Narayan, 10 Bom L R 811, *Dukha Mandal v W N Grant*, 16 C L J 21 and
Allooli v Tarak Nath Ghosh, 17 C W N 774-16 C L J 329, and it is
perhaps too late to contest it. If this other view is adopted it should be held

34. *Sen v. Bijoy Chand, supra*, see also *Jainab Biswas v. Sita Kumari Devi*, 46 C L J 253=101 Ind Cas 733=A I R 1927 Cal 855, *Manichand v. Parakaji*, 9 Mys L J 337. It is essential in every case where reliance is placed upon books of account in the course of business; the entries themselves removed by the admission of the opposite party. *Bibi Inambandi v. Hira Motasuldi*, 15 C L J 621=13 Ind Cas 678. Under the Indian Evidence Act entries in books of account regularly kept in the course of business are admissible in evidence, not only for refreshing the memory of the witness, but also as corroborative evidence of the story which he tells. Books of account which profess to record facts relating only to the particular transaction in question are less reliable than a book where in the same is recorded in common with other transactions in the ordinary course of business. *nathan*, 29 C 331 P C=6. It is not necessary in a written and that they were kept in regular course of business. If a *gona* and a member of a firm were examined and depose that the accounts were regularly kept, the accounts may be held to have been proved in the absence of evidence to the contrary. *Biccha Lal v. Jas Pershad*, 45 P R 1899. A party who calls for an account book is bound by all the entries contained therein. *Shib Pershad v. Promotho*, 10 W R 193; *Rameswari v. Bal Kishun*, 9 A 713 P C.

Account books the Privy Council in *Jaswant v. Sheo Nara* are instructive as to the variety in account-book al value, but merely a man's private record, p accordance with his private and convenience. "Other accounts may be so kept, and may so tally with external circumstances, as to carry conviction that they are true." "And," the Lordships continue, "the Evidence Act, section 34, therefore, enacts that entries in books of evidence, The admission to the general rule laid down in section 34, is that "The word paper bound by tearing a p in the sense of portfolio, or clip, or strung together on a piece of twine which is intended at will, would not in the ordinary English, be called a book. But so narrow a signification would not do in India, where accounts are often kept on sheets of paper laced or threaded together in a manner which allows removal of any sheet at any time by the nature of a book. Of this class are the books of practically every Man in the English Copyright every volume, part or div of music, map chart, or for the convenience of the Act, and when enacting section even the Man not made in intended not to be taken apart at any time for any purpose."

however to say what is not a book for the purpose of section 34, hesitation in holding that unbound sheets of paper, in whatever quantity, whether filled up with one continuous account, are not a book of account within the purview of section 34.

account of reli

ing substantive evidence on which reliance may be placed. A private diary may be most regularly kept and contain made, of the utmost value. It may be used as a witness or refreshing his memory and others of the Evidence Act; for such user does not make the document itself evidence. (*Cf. Ramya v. Rangayya*, 1 M. H. C. R. 168). It may also come in under section 32 (2) if the requirements of that section are satisfied. But no entry in such a diary can be filed as documentary evidence of the facts stated in it in favour of the person making the entry if he is a party to the suit. It would be excluded by section 21 of the Act, and section 34 provides no exception in favour of it. The reason for such differentiation between a private diary and a private account is manifest. An account, regularly kept necessarily results in a continuity which makes fraudulent addition extremely difficult and dangerous, it is a chain of forged links into which the subsequent interpolation of a link of forgery without discovery is almost impracticable. The man who wishes to defraud his neighbour accounts, or, having kept them, suppresses them. A book of account, on the other hand, with truth in regularly kept account popular, because of the mathematical connection running through them. But these safe-guards of truth are entirely absent in the most regularly kept of private diaries, and subsequent interpolations, to meet an unexpected demand and facilitate fraud, are generally possible without difficulty and danger of discovery. It is clear that the Legislature, which guides itself by human experience, had such considerations before it when it enacted, by section 34, an exception to section 21, in favour of books of account. I am therefore of

discovery are not admissible under sec 34" *Per Stanton & J. C. in Mukund Ram v. Dayaram*, 23 Ind. Cas. 893 (891, 895) = 10 N. L. R. 44.

course of business

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ows" and not "proves". It is

34 of Act I of 1872 = not

Act II of 1855, and this seems

section 31, indicate that the

'regularly kept in the course of

business—in the first place, making them relevant whenever they refer to a matter into which the Court has to enquire, and next, providing that when such entries are sought to be used as statements for a particular purpose—namely, to charge any person with liability, they shall not alone be sufficient evidence for the purpose. Section 32, clause (2) makes relevant a statement consisting of an entry made by a person who is not a witness before this Court, in books of account necessarily books of account but—kept in the ordinary course of business. A

S. 34.

Per *Mookjee J*

the old Act I

regularly kept

"proved to have been" have been dropped. In the later Act I of 1872 the w
in the law. The legislature has dispen
that the book

and as appears on its face to create liability in an account with
the party against whom it is offered, and not be a memorandum for other purposes
Burr Jones § 570. The entries in the books of account should relate to the
business or occupation of the person whose books they are and not to transac-
tions of such person having no relation to his regular business or occupation.
But the admissibility of the book in respect to proper items will not be lost
because of the fact that the book contains some entries not connected with the
regular business of the party. The character of the entries is not a
particular, and should itemize the
frequently

most elementary

Finally, when *Ganesh, 95 Ind Cas 100* evidence, but would of course

balance and general accuracy of an account-book is not admitted, it must be
formally proved. *Mukundam v Dayaram*, 10 N. L. R. 41-23 Ind Cas 500.
They may be kept in the form of a ledger, if this is general mode in which the party
keeps his books, provided the entries are original entries. The entries may be
made in pencil, or in the form of a time-book, and not only of
the labour of the plaintiff.

Cash books in which the entries are not made at the time of the transaction
evidenced by them are admissible in evidence. The statutes do not generally
prescribe the form in which books are to be kept, nor the degree of definiteness
to be observed in making entries. They have been so framed as to have a very
general application. The account-books of an illiterate labourer, as well as
those of a tradesman or a banker are admissible in evidence if within the necessary
condition, the purposes of which are to secure authenticity and credibility in
respect to the evidence, rather than to prescribe the form of it. Whatever may

be its form, it is only evidence *prima facie* of what is shown by it. Supplement- S.
ary proof may often be required to make such evidence relevant to particular
case. *Burr Jones* § 570

plaintiff that there were dealings between him and defendant, held, that the
dealings were not proved under s. 34, Evidence Act, in the absence of evidence
of specific sums having been paid. *Bulla v Trilok*, 100 Ind Cas 862=A I R.
1927 Lah. 903; *Narayan v Fithoba*, 100 Ind Cas 863=A I R. 1927 Nag. 177.
T. not prove anything.
H. account kept in the
n with liability. The

Firm of Jodha v Ditta, 81 Ind. Cas. 909=6 Lah. L. J 504=A I R. 1925 Lah.
242 This section does not limit in any way at all the nature of the material

tements in a book of account.
vouchers, receipts or other
Kallu Mal v Bhairavi, L. R.
6 A 375=83 Ind. Cas. 383=A I R. 1925 All. 742; see also *Tesunadiyan v*
Subba, 52 Ind. Cas. 704; *Abdul v Puran*, 82 P. R. 1914=277 P. L. R. 1914;
Ramaswami v Ramanathan, (1914) M. W. N. 240=22 Ind. Cas. 627 Where
a claim based on entries in account books is entirely denied, plaintiff must
prove the various items of his account by independent evidence, as the entries
cannot in themselves charge any person with liability. *Ganesht v. The Firm of*
Mangal Ram Atma Ram, 76 Ind. Cas. 157 In a suit for recovery of water cess,
bills entries showing that in previous years the defendant has been paying cess
at the rate demanded, are admissible in evidence. *Prabhu Dyal v Ram Chander*,

n slips of paper
the books cannot
be rejected on the ground that the entries were not made in them regularly from
day to day *Mangal Prasad v Manjir Das*, 11 Ind. Cas. 95. Where the
plaintiffs can easily produce independent and trustworthy evidence in support of
entries in their account books, it would be unfair to defendants and wrong in
principle to accept as sufficient proof the entries, uncorroborated by any evidence
one of the plaintiffs to the effect
Ganga Rari v Kala Ram, 53
try in the pamphlet alone is not
entry which is denied. *Keshavan v.*
book, not otherwise suspicious, is
supported by *prima facie* reliable
R. 1909 Entries to be admitted
for testimony must be made in the
to prove that the entries were

taken from books which were regularly and correctly kept. *Queen Empress v.*
Sayed Sarjawan, Rat. Un Cr. C. 314=Cr. Rg. 37 of 1887. Though certain
account books are proved not to have been regularly kept in the course of
business, yet if they are proved to have been kept on behalf of a firm of contract-
ors by its servant or agent appointed for that purpose, they are relevant as
admissions against the firm. *Rey v. Harwant*, 1 B 6, 10. If books are kept in
pursuance of some continuous and uniform practice in the current routine of the
business of the particular person to whom they belong, they are 'books of

S. 34.

that the books were kept up in the regular course of business. It is a matter of intrinsic evidence as to whether the books in question were books of account regularly kept in the regular course of business. *Emperor v. Narbada*, A. I. R. 1930 All 38. The book should be such a regular and usual account book as explains itself and as appears on its face to create liability in an account with the party against whom it is offered, and not be a memorandum for other purposes. *Burr. Jones* § 570. The entries in the books of account should relate to the business or occupation of the person whose books they are and not to transactions of such person having no relation to his regular business or occupation. But the admissibility of the book in respect to proper items will not be lost because of the fact that the book contains some entries not connected with the regular business of the party. The charges in the book must be specific and particular, and should itemize the transactions recorded. Such entries have frequently been rejected when they consisted of charges in gross for contracted services. *R. v. Jones* 8 F. 71.

have no weight. *Kesho Ran v. Ganesh* 45 Ind. C. 178-A. I. R. 1910, must 407. "FIR" see that the supposed, usually called the *mahajani* system. Their evidential value must depend upon their formality and the checks against fraud secured by method of recording with admissibility. As regards will be admissible. As regards of a large bank, and the day-book of a house-keeper. The difference lies in the weight to be given to the entries therein. But where the fact of regular must be

stubs of checks, several days after the issuance of the checks, are not. Cash-books in which the entries were made at the time of the transactions evidenced by them are admissible in evidence. The statutes do not generally

respect to the evidence, rather than to prescribe the form of it.

absence of recital in ■

who is not a party

the case of *Ram Persh*

restricted in the sum

621=13 Ind Cas 678; *Ah Nasar Khan v Mamul Chand*, 25 A 90=22 A W N 207; *Pragdas v Dauallaram*, 11 II 257; *Debendra v. Arun*, 1925 Cal 65; *Tarakumar v Arun*, 74 Ind Cas 383; *Kasam v Hay*, 76 Ind Cas 327; *Ganga Ram v Lachmi ram*, 19 C. W. N. 611=28 Ind Cas 705; *Imambandi v. Day* *Mulsaddi*, 28 C L J 409=45 C. 878

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causes they have a suspicious and fraudulent appearance, and are not explained they should be rejected. The book may be admitted as to entries which are proved to be original, although other entries in the same book are not original, unless the two classes of entries cannot be distinguished. Irregularities in account-books sufficient to justify their exclusion must be gross and palpable. Books of account must, however appear to embrace all of the items of account between the parties which are proper subjects of entry. The account book must

the power of
of the book
and veracity

give evidence of facts or circum-
stancs ■ not fairly and honestly kept as a
r routine of business, subject, it is

said, to the limitation that the investigation should be confined to a time at or near the period covered by the account in suit. *Chamberlayne's Ev* § 3148

Jama wasil baki papers Where certain entries are admissible under section 32, the position is that there is no statutory obligation to look for anything else in order to found the liability. It does not follow that such entries should necessarily, in any event, be regarded as conclusive of the truth of the statements therein made. When such entries in the landlord's papers are sought to be used against the tenant, their evidentiary value has got to be carefully

evidence to show when and by whom these entries in collection papers were

34. made Held that the collection papers were inadmissible in evidence *Altors v Tarak Nath*, 16 C L J 378. *Jama rasul bai* papers have no weight as corroborative evidence *Sunomoy v Johur Mahomed*, 10 C L R 340. *Belaet Khan v Rashbehary*, 22 W R 519. *Gopal Mandal v Nabokristo* 2 W R (Act X) 83. *Kherromonee v Beyoy*, 7 W R 533; *Umed Ali v Habibullah* 47 C 266; *Yeshuradnyan v Subba Dasler*, 52 Ind Cas 704; *Ducarka Das v S. Baksh* 18 A 92. *Mahomed Mahmud v Safar Ali* 11 C 407. (409), *Fanilin v Agnikumar*, 71 Ind Cas 300, *Jonah v Siva Kumar* 16 C 733 = A I R 1927 Cal 85; *Tr...*

Evidence

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Taira Aas

accounts

specifically states that of itself it shall not be considered to be sufficient evidence to charge any person with liability *Bhagwat v Prasad* 15 R D 401

Account books, entries how to be proved. Where certain accounts were produced in the original Court by the plaintiff, and all that was proved was that they were in the handwriting of his father, and the books were not examined in detail in the original Court, and the particular entries upon which the plaintiff relied were not selected and exhibited it was held that the entries ought to have been pointed out and proved and evidence should also have been given in detail as to the character of the books themselves. *Hungumji v Heramba Chandra*, 8 Ind Cas 81 = 13 C L J 139. In that case the Court in delivering the judgment said "It is essential, in every case where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business. It is perfectly true that as laid down by their Lordships of the Judicial Committee in the case of *Deputy Commissioner v Parsad* 27 C 118 = 26 I A 251 = 4 C W N 417, they need not be written up from moment to moment or from day to day. But it is obvious that if they have been written up casually once a week or a fortnight, though they may be admitted in evidence, obviously they do not possess the same claim to confidence that attaches to books entered from day to day or from hour to hour. Transactions take place (*Uncher Shaw v New Dhurumsay*, 4 B 570). The proper procedure to follow therefore, is, as laid down by the Judicial Committee in *Duarka Dass v ...*

has kept the accounts or prove that the books have been regularly kept. But this is not all that is necessary, section 34 makes the entries relevant if they are entries in a book of account regularly kept. It is therefore not sufficient merely that the entries themselves have to be proved. It is moved by the admission of the original books were produced in the original Court. The plaintiff selected and exhibited at all. Obviously there is considerable laxity to have been pointed out in detail as to the character of the books closely has been applied to use ...

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by him soon after the *furd*, embodying the expenses, and *maskabar*, monthly accounts, were prepared. It was found that these latter accounts were kept regularly in the ordinary course of business. The *maskabari* and *rolat* books, *furd* under Mohan, it gave a decree for the plaintiff on the evidence of his account books and of his book-

going into the witnessbox was not entitled to succeed *Hira Bhagat v Gobind Ram*, 63 P R 1897

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ertain disputed items interpered in the account should not be disallowed
no specific evidence
by such fictitious items
Hanumanta v. Akbar,
O P R. 1910-147 P. L. R 1910-117 P W. R 1910 It is not a condition
precedent to accepting entries in account books as relevant under section 31,
Indian Evidence Act that it should be proved how the accounts came to be
written, and
necessary to
to be establish
who were examined as witness for the defence, was considered sufficient
corroborative evidence of the accounts to charge the defendants with liability.
Bichha Lal v. Jas Pershad, P. L. R 1900, 5 It is unnecessary to prove, by
independent evidence, the correctness of every single item of an account extend-

for the decision of the
witness likewise observed
all account books, but
each book contained that amount of difference which was appropriate to its
character. The committee also used the better test of genuineness than the
correspondence
other evidence,
firmly the deci
I A 6 P C

Plaintiffs sued to recover money due as balance of a running account and

The various items entered
plaintiff, the High Court
or this section, sufficient
be evidence, however, one
of the plaintiffs having given evidence with reference to the account books,
stating the amounts advanced to and repaid by the defendant, and no question
speaking from his own
lence of a witness for the
was sufficient to uphold
Larka Das v. Sant Baksh,

Kalu v. Bhairani, 33 Ind Cas 353-A I R. 1925 All. 742, *Abdul v. Firm Ditta*, 81 Ind Cas 909, *Gopeswar v. Bhoj*, 23 B 291, *Dhuka v. Grant*, 16 C L J. P C, *Ganashi v. Firm*, 76 Ind Cas. 157; *Khumi Mal v. Duarka Das*, 1930 A L J. Corroborative proof must be given by evidence, it seems to have been deemed necessary that this corroborative evidence should be furnished if the rule itself is to apply. Confirmation of a particular item may be sufficient. In other words it was necessary for the proponent to call third persons such as those who had dealt with the plaintiffs and found their books to be correct. Where evidence of this produces the best good faith with In this connection. The book to be verified by the testimony of the witness must be the same in which the account in question is entered. *Chamberlayne's Lr* § 3096. But such entries are evidence against the person making them. *Angama v. Bharmajpa*, 23 B. 63; *Mathilda v. Gaebels*, 96 Ind Cas. 429-A I R. 1926 Mad. 955; *Jodha Mal v. Ditta*, 81 Ind Cas 909-A I R. 1925 Lah 212.

accident. *Seth Maganmal v. Darbarilal*, 24 N L R. 10-30 Bom. L R. 296-107 Ind Cas. 118-47 C. L J 222-A I R. 1928 P. C 39.

35. An entry in any public or other official book, register or

Relevancy of entry in public record, made in performance of duty, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

General Principle An exception which in practice is by far the commonest in its employment is the exception admitting statements made by officials in pursuance of official duty. The principle of Necessity, which in one form or another, insanity, the death, arant, but

attendance of the officer is corporally impossible to obtain, there is a high degree of expediency that the public business be not deranged by insisting on the strict enforcement of the Hearsay rule. *Wigmore* § 162 (m).

S. 35. The second essential for an exception to the Hearsay rule is that a circumstantial guarantee of trustworthiness be found, to take the place of a confrontation and cross-examination so far as may be. Two reasons are given by the Courts as not sufficient in this respect. The first is that public officers do not satisfy the exception.

§ 163 (m) In P.

"The law requires that it presumes they will discharge their duty with accuracy and fidelity."

charge of their public duty may be true, under such a degree of case may appear to require." Sir Kennedy, 5 App Cas 623, F 468, Parke B said

by the reason of the duty which will usually be the duty

Possibly the officer may not be one from whom in advance an oath of office is required. No stress seems to be laid judicially on either of these considerations, nor need they be emphasized. It is the influence of the official duty, broadly considered, which is taken as the sufficient guarantee of trustworthiness, justifying the acceptance of the hearsay statement. Wigram § 1632

making of this particular official statement is hardly amenable to the correction of errors by public inspection—its efficacy must be of the moment, for it is not supposed that the public, or specifically interested members of it, do in fact (whatever their rights may be) ever demand inspection of the vast majority of official records that are made, and there can be hardly any chance of checking or revision from that source. It would seem that the second reason, put forward so definitely by Lord Blackburn, is to be regarded as merely a casual advantage, and not an essential limitation, of the class of documents to be included within the exception." Wigram § 1632

case at the present, statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorized agents of the public in the course of official duty, and that they were made in the public interest or required to be made by the public. *Taylor Ev 10th Ed § 1591* "In many cases a lapse of years, it would be impossible to require that the facts contained in such documents were made by the public. An exception is made to the rule that statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorized agents of the public in the course of official duty, and that they were made in the public interest or required to be made by the public. *Ghulam Rasul v Secretary of State*, 30 C W N 101 (101)-86 Ind Cas 651-52 I. A. 201-23 A. L. J 639 For further discussion vide next topic.

v. Malapat Singh 5 C 714 751, 753-L R 7 I A 63; see also *Malikarjuna v. Secretary of State*, 35 M 31) So the register is admissible irrespective of whether the official who actually wrote the entries had any personal knowledge or whether the register was a copy of a previous register which had become untidy. *William Graham v Phanindra Nath Mitra*, 19 C W. N 1038; *contra Ambalariya v Sree Unakshy*, 29 M I. J 217-26 Ind Cas 841-(1915) M. W. N. 76 Now let us examine whether the principle is violated on the ground of want of personal knowledge on the part of the entrant. The argument for excluding the use of entries except for facts necessarily within the entrant's personal knowledge is thus stated by *Denman L C J* in *Doe v Wallaston*, 1 Moo & R. 389. "The clergy man must be present at the time (of the marriage) is of baptism, the time of

here stated necessarily within the But *Pattison J.* thus reasoned for there was no personal knowledge on the part of the entrant. "Must we not take it to be the act of the incumbent, who, however he got his information, had satisfied himself of the fact before he sanctioned the entry?" *Doe v France*, 15 Q B 758 In the same case *Wightman J.* having taken English Comn

1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 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The second essential for an exception to the Hearsay rule is that some circumstantial guarantee of trustworthiness be found, to take the place of cross confrontation and cross examination so far as may be. Two reasons are stated by the Courts as justifying the present exception in this respect. The first is that public officers do not make statements without a sense of responsibility and a consciousness of the consequences of their statements. The second is that public officers are not likely to make statements without a sense of responsibility and a consciousness of the consequences of their statements.

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such entries in it, after satisfying himself of their truth. See also *Loxley v. Kennedy*, 5 App Cas 623, 641. In *Irish Society v. Bishop of Derry*, 12 Cl & F 168, *Parke B* said "The bishops in making the return discharged a public duty, and faith is given that they would perform their duty correctly, the return is therefore admissible on the same principle on which other public documents are received." The fundamental circumstance is that an official duty will usually make an accurate statement, and that this special and weighty duty will usually suffice as a motive to incite the officers to its fulfilment. Possibly the officer may not be one from whom in advance an oath of office is required. No stress seems to be laid judicially on either of these considerations, nor need they be emphasized. It is the influence of the official duty, broadly considered, which is taken as the sufficient guarantee of trustworthiness, justifying the acceptance of the hearsay statement. *Wigmore* § 1632.

of official documents, there are everywhere numerous official documents, and the person having a special interest in them is not likely to be a person of high character.

and comparison by another person before use in Court is shown. The making of this particular official statement is hardly amenable to the cross-examination of the person making it, and the statement is not likely to be made with a view to its being used in Court.

vast majority of official records that are made, and there is no chance of checking or revision from that source. It would seem that the second reason, put forward so definitely by Lord Blackburn, is to be regarded as merely a casual advantage, and not an essential limitation, of the class of documents to be included within the exception. *Wigmore* § 1632. "In such cases the statement is not likely to be made with a view to its being used in Court."

city be not confirmed by the usual tests of truth, namely the swearing and the title I to this by law to out at se en be difficult to prove them by means of sworn witnesses" *Per Bayne J in Games v Pelf* 12 How 172, 570, *Wigmore* § 1631. So "official registers, or books kept by persons in public office, in which they are required to write down particular transactions, or to enrol or record particular contracts or instruments, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth—the obligation of an oath and the power of cross-examining the persons on whose authority their truth and authenticity may depend. This has been said to be because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office or in the discharge of an official duty." *Per Fowler J in Ferguson v Clifford*, 37 N H, al books, etc, books, and keep *Nort*, E

guarantee of reliability to render them admissible if offered in evidence. *Uchikun's Ev* § 206. The exceptional privilege given to public records by this section cannot be extended to entries which a public officer is not expected to, and is not permitted to make. *Ali Nasar v Manikchand*, 25 A. 90 (F. B.)—1903 A W N 207; *Vadhabrao v Deonah*, 21 B 695. There must be

might not be admissible. *Bhanya Dnyaj v Beni Mahto*, 22 C W N 139—23 M L T 382—20 Bom L R 712—28 C L J 1—47 Ind Crs 1 (P. C.) But registers kept under private authority private individuals are inadmissible (1913) 1 Ch 392, *Whittunck*, v R 303, *Doe v Gasacre*, 8 C & P 5 it is not the duty of the officer to 14 App Crs 137, *Farrell v Maquire*, 3 Ir L R 187. A register can be received to prove incidental particulars concerning the main transaction where they (1920) 1 Ch 284 town to be prepared any other person be country, nor has the act or record in absence of proper I H 1930 All.

English Law. Another exception to the hearsay rule consists of statements contained in public or official documents which are admissible as evidence of 291 Statements Royal proclama-

United Ins Co 7 Johns 38; mentary Journal (upon all matters properly before either House, *Jones v*.

- S. 35. *Randall*, 1 Cowp 17; *Root v*
matters, *Oates Case*, 10 How. St 71
 not conclusive evidence of the f
Frachin, *supra*, 111-112
 Official records
 is required by
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 England, a ch
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- or reference, and (2) the
 cr. *Ibid* p 293. So in
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Draycot v Talbot, 3 Bro P C
May, 2 Stra 1073; *Wheeler v Law*, 3 Star, R 63, D 1
Larnes, 1 M & Rob 389; *Stark*, L
 Eq 373, *R v Weaver* L R 2 C
 the church of England, from the t

Hubbock on Succession, 470; 474
 in 1644 and 1653 provided for the registration of births, deaths and marriages
Scobell's Ordinances, 76 236. *Dudley's Case*, 2 Sid 71 But these Ordinances
 were annulled upon the restoration of Charles II And registers kept and
 ecclesiastical authority continued to be admitted in evidence by the Courts
 although not required to be kept, nor declared to be evidence by any Statute
 This is probably the meaning of *Lord Holt's dictum* that such registers are
 evidence from "the nature of the thing", and of the additional words attributed
 to him by one reporter of least au
Burgesses of Droitwich, 1 Salk 28
 the time of the decision of that ca
 which were repeated

Will IV
 Statutes of

register, 13 L J N S Ch 399
 of the baptism of the ambassadors and
 entries in

of their own or of England. *Evans v. Ball*, 33 L. T. 111; *Taylor* § 1593; *Philp* S. 7th Ed. p. 329.

entry must have been contemporaneous with the transaction of being under oath, but the official character of the transaction appears to afford a *prima facie* guarantee for its truthfulness—stronger, perhaps, than that which obtains in respect of books kept in the ordinary course of business. *Nort* F. 200. But the entries should be made promptly, or at least without such long delay as to impair their credibility. *Philp* 7th Ed. 330, *Doe v. Bray* 8 B. & C. 813.

Under the Public Documents Act, the following documents are public documents—(1) documents forming the acts or resolutions of any official bodies and executive, whether of the Crown, of any of the Colonies, or of any of the dominions, or of any of the public officers of the Government, or of any of the private documents of the Government.

5 App.
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that it

in a corporation book concerning a corporate matter, or something in which all would be public within that sense. But it must be made by a public officer. I understand a document that is made for the purpose of the whole to refer to it. It is meant to be where

there is a public officer or a public body, and it is to be the whole of the public body, but I

for the purpose of being made accessible to it afterwards.

any cases entries in the public books, and they were

"public" then, because the common law of England making it an express duty to keep the public books.

kept by a public officer, and it is its accuracy, and

at, in every case, it has been made

, is a register to be made public" says Prof.

being known or observed by any person, and it is open to all, capable of being known or observed by persons in general.

Ind. Cas. 125—A. I. R. 1926. In cases, be a public record within it does not follow that every made in pursuance of orders given by the latter, is admissible evidence to prove such fact. *Malikarjuna v. Secretary of State*, 35 M. 21—14 Ind. Cas. 401.

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Other official book, register or record. It is important to observe that whenever it is the duty of a public official, either at common law, or by Statute to record certain facts in any book which is referred to as a register or record, not only the facts so recorded in the referred to ever after."

kept by any law. The statement of the station writer, the register not being one direct

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N 65 The certificate of guardianship is no evidence of the age of the m
under this section, for it is neither a book nor a register, not a record kept
any officer in accordance with law
Teishkhan papers prepa
not papers of the de
Samar Dasadh v Jaggu
of this section can be
kept outside British Ind
Teishkhan Register (so called from the number of columns in the statement
register) prepared by a person who is called a patidar and submitted to the C
ector, in accordance with the rules framed by the Board of Revenue under a
of Reg XII of 1817, is not an official publi
Makhan, 18 C 531

Durgay v Deo Bahadur, 22 C W N 439-23 J L T 382-23 C L J 1st

28 Bom L R 1225 = 50 B 716 = A L ..
 21 of the Indian Penal Code and s 2 (17) of the Constitution
 7 B L R 448 = 16 W R

Can., 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581,

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are not fitted for entry in a single office volume. The return differs from the S.
 sufficient in that it is preserved in official custody. A further distinction, within
 that the former deals with
 r, while the latter records
 it has occurred out of his

s 1637. It must always be a
 correspondence which do, and those which do not, fall within the scope of s 35
 But where there is a statutory duty laid upon public officers to investigate and
 report facts, a report of the facts elicited by their investigation is an official
 record within the meaning of this section *Ramakrishna v Tirunarayana*,
 A. I. R 1932 Mad. 198.

1 str
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 it essential that a register should be
 7th Feb p 330, see also *Graham v*
Winsfield, 18 Vce 143; *May v May*,
 P 552

Nature of the Duty—General Principles Whether a given statement was
 made under an official duty will depend chiefly upon the nature of the office, the
 subject of the statement, and the form of its making (1) It is clear that no

they did not occur (7) A statement otherwise admissible is not generally to be
 excluded where there existed for the declarant a special interest or motive to
 misrepresent (8) The person having the duty and the person making
 the statement must on principle be identical *Wigmore* § 1633

Any other person in performance of a duty, etc An entry in a *Chauki-*
dar's register of births and deaths was relied upon as proof of the date of the

S. 35. birth of a person The entry was admittedly not made by the Chaudhlar & there was no evidence that it was made by any other public servant or that it was the duty of any public servant to make it. *Held*, that the register was not admissible under s. 35 of the Evidence Act. *Ganpat v. Gauri Sanlar*, 190 C 68.

Errors of interest

affect the weight of

App. Cas. 437, *Falcon*

They do not also affect

(1907) 2 Ch. 592. So also, the fact that the entry is in the interest of the owner or body keeping the register, affects weight only, not admissibility. *Irish Exch. v. Derry*, 12 Cl. & F. 611; *Philp. Ev. 7th Ed.* 330, *Sturla v. Neccia*, L. R. 5 App. Cas. 623, 628.

Wajib-ul-arz. An entry in the *wajib-ul-arz* is admissible in proof of the custom under s. 35 and its validity does not depend upon the question whether the *wajib-ul-arz*

Hasan v. Abdul

village administrator

the statements

rights and customs

of such rights

and purport to give the history of the devolution in certain families: when the narrators stand in no better position than any other tradition. When the incidents are not with a

safe to accept

4 O W N

have been

is shown by the party alleging it. *Manya v. Sitaram*, 23 N. L. J. 407-408, App. Cas. 438-A, I. R. 1927 Nag. 147, *Wasiq Ali v. Mihar Ali*, 110 Ind. Cas. 4-5, I. R. 1928 Oudh 409, *Sartaz Koer v. Mahadeo Bux*, 29 O. C. 153-92 Ind. Cas. 657-A, I. R. 1928 Oudh 320. *S. H. Singh v. Rustam, Singh* 3 O. W. N. 121.

or *Rinaj Ram* should be supported by instances. *Bayi Nath v.* An entry in a *wajib-ul-arz*

Singh v. Babu Lal, 21 A. L. J. 822-L. R. 4 A. 557, *Sher Anwar v.* 78 Ind. Cas.

existed or that

had been made

207 *Wajib-ul*

of 1863 when much more reliable than oral evidence given after the event. *Ashgar Ali*, 57 L. A. 29-52 C. L. J. 183-A, I. R. 1930 P. C. 30-53 Ind. Cas. 156 (P. C.) in the village records

was laid down for his
216 = 13 C. W. N.
Musammal Lali v
= 10 C. W. N. 730;
63; Isri v Gujga,
Moharaja, 2 A. L.
arurudhucaya, 15 A
, 16 A 10, Garura-

W. N 33 = 23 A 37; *Ali Nasir v. Mamul Chand*,

25 A. 90.

Riwaj-i-am. An entry in a
facie proof of the custom *Lah*
924 = A I R 1927 Lah 241, *Ghu*
Ruaj-i-am being a public reco
of his duties, is admissible in evidence to prove the facts therein entered and the

Lah. 99 = 1923 Lah 401

fact;
rana;
Ind
swam

a judgment,
therefore, an
to a relevant
the judgment
In support
Purno Chunder,
15 M 378 and

it is contended that the relevancy of judgments is governed by sections 40 to 43
of the Evidence Act and that a judgment not *inter partes* is not evidence

issue or relevant fact, even though the judgment may be between persons who

ds" Then after dissenting from the
Parbutty Dassi v Purno Chunder Singh
Mahpal Singh, 5 C 744 = 6 C L R 593,
correctness of this decision (i.e. *Parbutty*
submitted in *Sundar Das v Fatimul ul ussa*

Appavu, 12 M 9
judgment not *inter*
a fact in issue or

I, L. A.—83

5. 35.

tion between the parties."
Ind. Cas 298 = O C W N
Ind. Cas 593 = 43 C 707 =

20 C W N 802 = 11 A L J 121 = 18 Bom L R 490 = 21 C L J 116, see also
Asa Singh v Uansa Ram, 621 Ind C, 509 = A I R 1930 Loh 237 On a
consideration of the authorities and the provisions of the Evidence Act it is clear
that such an admission is admissible.

L. R. 763

relevant under s 35, Indian Evidence Act. *Gelumul v. Kurummal*, 10 D L J
28 = 35 Ind Cas 551

accepted as conclusive of the dates of the death recorded in the
Ranga Swami, A I R 1925 M W N 233 = 88 Ind. Cas 249 = A I R 1925
Mud 1005 The register of deaths maintained under para 807 of the Police
Regulations is admissible as evidence of death.

Reddi v. Kotayya, 33 M L J 100 = 111 of 1899, the Registers of Births and
Deaths of the Board of Revenue since the year 1865 do
not come under this section. *Ibid* Entry in death register may be rejected when used
to prove or disprove death on a particular day, if register is prepared in casual
way. *Kali v. Sashi*, A I R 1930 C 100 = 100 Ind. Cas 100 = 100 A I R 1930 C 100

tribunal *Phup v. 7th Ed. 332.*

of partition which affected the public revenue is admissible in evidence for
all purposes only. *Abdul Haqq v. Abdul Khasra* is not a record within
the meaning of s 35 of the Evidence Act, but is admissible as evidence of the
fact of partition. *Abdul Haqq v. Abdul Khasra*, A I R 1923 P. 163. See also

weight cannot be attached to a partition paper in the absence of detailed information. S.

35 of the Evidence Act. *Sothi Bhoosan v Girish Chunder*, 20 C. 340; see also *Ramsarup v. Ramnaram*, A. I R 1929 Pat. 32. A *batuara chitta* is not admissible in evidence under s. 35 of the Evidence Act. *Isuar Chandra v. Turanath*, 1 Ind. Cas. 607. Entries in *batuara khasia* papers are admissible in evidence, but it is for the Court to decide in each particular case whether the

made in a proceeding under Reg. XIX of 1831 between predecessors of the parties to a suit are good and admissible evidence, quite apart from anything contained in section 35 of the Evidence Act. *Khetra Nath v. Mahomed*, 23 C. W. N. 48-45 Ind. Cas. 921.

Entry in a certified copy. Under this section an entry made on a certified copy indicating the date on which it was completed is certainly relevant. But when an enquiry as to correctness of such an entry has been started or its

report *Nizam Din v Mahomed Iqbal*, 168 Ind. Cas 619-A. I R 1928 Lah. 643.

Ghosi v. Ajudhia, 14 R. D 444

Satish Chandra Mukho-
ficate of guardianship was
be a record kept by a

S. 35.

erem So in the province of
strict Judge to a guardian
made by a public servant in
in such record is therefor
meer Hasan v Fiaz Hussain
Luck. 602

A I R 1929 Oudh 135; see *Mehdi Ali v. Walayat Hussain*, Luck. 602
O W N 25=121 Ind Cas 277=A I R 1930 Oudh 97

duty

to till

ship

of his official duty and the same was recorded It was held that the statement
was admissible in evidence on the question of relation-him under this section

Lal Harihar Pratap v Bishesu

Ind Cas 422=A I R 1928 C

by the surveyor who recorded

Its Illce 5 Rnt L I 116=99 Ind Cas 166=A I R 1936 Rang 404; Ali

entries in a prescription register maintained by a Government compounder or c

witness. *D Cruz*

Oudh 310 All

final or sole test

Bidya Prasad v Surkhur, 134 Ind Cas 638=A I R 1931 Pat 263 L
of Chari Assistant Collector is admi-

sible Gany

is admissib

Singh, A I R 1932 Oudh 137

A report in police diary
witness. *Abheraj v Gaj*

Where the subdivisional officer directed an enquiry by a Kamnjo of the
circle into the matter of the complaint by virtue of s 202 (1) of Cr Pro Code
report was admissible

the actual state

for that purpose

being an officer

comes under section 35 of the Evidence Act, and is admissible without formal proof *Mohan Singh v Emperor*, L R C A 49 Cr =55 Ind.

617=26 Cr L J 551=A I R 1925 All 413 The contents of the report may

be used as a corroborative piece of evidence to show that the implication of the

accused in the offence is not an after thought. It cannot certainly be used as a

substantive piece of evidence *Mohan Singh v Emperor*, supra

An *Inam Register* embodies the conclusions of the *Inam Commissioner* on S. 35

3 Ind Cas 616 = 48 M L J
Protap Chandra Deo v Jayadish Chandra, A. I R 1925 Cal 116. Entries in
the *Siyohs* are made by the *Pattars* in the ordinary course of business and are

4 M L J 112 = 72 Ind Cas 211. Extracts from Revenue Registers Nos 1 and

Surendra Nath, (1919) Pat 465 = 53 Ind Cas 20

A recital in a public record as to a statement made by a public servant with
reference to a particular statement of the grant by the Government may be
admitted, under section 35 of the Evidence Act as proving that the public
servant made the statement that he is to have made, if the fact that he made
such a statement is a relevant fact. *Sanharacharya v Manali Saravana Mudaliar*,
31 Ind C 876

Revenue Records are not evidence of title for they are kept for fiscal pur-
poses and it is not part of the duty of the Revenue Officer to record title. But

under the Land Acquisition Act *Secretary v Satish*, 58 C 828 = 35 C W Bh
173 P C

Though survey entries in survey records may not be sufficient evidence to
prove that certain land is *poramboke* they are good evidence where the only
question is as to the extent of *poramboke* land *Kalayal v Secretary of State*, 2
L W 413 = 29 Ind Cas 154

Officer that the name of this or that person was entered as the occupant of
certain lands could be admissible if relevant, but it would not be admissible

THE INDIAN EVIDENCE ACT.

S. 36.

36.

Statements of facts in issue or relevant facts made by published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, or matters usually represented or stated in maps, charts or plans, are themselves relevant facts

Principle This section offers charts generally offered for authority of Government

are in favour of any inaccuracy being challenged and exposed" *Field Et 10* (7th Ed) The person or persons who prepared the map in question, being unavailable, both the principle of Necessity and the principle of the Guarantee of Trustworthiness are satisfied. Hence

ment surveyor
rized to do; an

admissible *Wigmore § 1665* official surveys, and his returns are then

Scope of the section

charts offered for public sale and entry, etc., and as regards the section refers not

helds *White's St*, also boundaries of villages and (in *Khassas*)

B D 406, 14 Cox C C 436, 6 App Cas 229, 14 Cox C C 546 *Lind*
rule excluding declarations *admissible in Engla*
Car & P 481, *Bridge*
L R 5 Ch D 709

map is prepared, must be an authority given by statute *Gahyo Lu*
Jagai Pal, 11 C W N 230=9 C L J. 415 But there must be judicial
quasi-judicial duty to enquire by a public officer *Sturla v Freca*, 5 App L
623, *Irish Society v Derry*, 12 C & F 64.

Survey

but as if
- 10 x 12

Evans v Taylor, 7 A & A 617; *Wigmore § 1665* These maps were also
because they were findings by a

it raises a reasonable presumption of title. Revenue Survey maps are not conclusive and may be shown to be wrong *Ramnanadan v Jaigobind*, 2 Pat. 339. *Thak* and survey maps are not conclusive as to whether lands which formed part of the bed of the river were included in the permanent settlement of 1793. It is not permissible for a Court to act on the assumption that in 1793 a state of things existed different from what appeared from any evidence before the Court. *Secretary of State for India v Upendra Narain*, 71 Ind. Cas. 819=A. I. R. 1923 Cal. 217=36 C. L. J. 336. Maps and surveys made for revenue purposes are official documents prepared by competent person with due publicity and after notice to persons interested as they are admissible as evidence. They are to be given weight.

As a rule *ex parte* statements in survey maps should be created on the same basis as books. Corroboration of distant times, available, their value assumes greater proportions, and if they indicate a state of

possession is sufficient to raise a reasonable presumption of title. A survey map is an official document prepared by competent persons interested and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made. *Debendra v. Surendra*, 31 C. W. N 419=102 Ind. Cas. 370=45 C. L. J. 474=A. I. R. 1927 Cal. 347; see also *Musst Bibi v. Deo Nandan*, 5 Pat. L. J. 681=2 Pat. L. T. 81=59 Ind. Cas. 298.

Where the parties consent to be bound to regard the boundary lines as laid by the authorities, correctness is presumed. *Kistwar* between them but evidence *Abdul*, 3 P. L. J. 101. In favour of the accuracy of *thak* and survey maps and it is for the party who

Ind. Cas. 182. There is no general rule that a *thak* or survey map must be presumed to have been in existence at the time of the permanent settlement. The question is essentially one of fact and must be determined on the facts and circumstances of each case. *Profulla Nath*

contrary made. maps but it is at the time of the permanent settlement. *Ananda Hari v Secretary of State*, 3 C. L. J. 316, *Muxa Shamsher v Kunj Behari*, 7 C. L. J. 414. Unless it can be proved that the person against whom a *thak* or survey map is attempted to be used

36. expressly consented to the delineation or admitted the correctness of such map; they have no binding effect. *Krustomom v Secretary of State*, 3 C W N 63. *thak map is admissible as evidence.*

But a sufficient to prove *v Gobind*, 9 C Watson & Co, 27 sought to be set an Amin's report. *v Musseshur*, 5 W. R. 34. If there has been a Government survey, the survey map must be taken as evidence. *Raja Choudharam v Gundharee*, 20 W. R. 25 W. R. 153; *Guddadhur v Tar*.

v. Fahramssa, 15 Ind Cas. 159.

Thakbust map sketches, in magnetic be made from *Bhusan Bane* *thak* author to title or pos *v. Secretary of State* 21 C W N 111. *legitimately be drawn from thak map* *Narendra La*

and is in possession of the zemindars *value of such a map is*

uncoverable from a mere inspection; nor their agents have by their signatures, admitted the correctness of the map. *Joytara v Mohommed*

in the *thakbust map*, prepared the revenue map by accurate observations made by expert surveyors with scientific instruments. *Keshabjee v Sanku Bhusan* 10 Ind Cas. 1027-A 1 R. 1926 P 385. As the object of a *thakbust survey* and map is to ascertain and delineate the boundaries of the estates borne on the Revenue roll of the District, the entry in a *thak map* that certain lands formed part of an estate become a relevant fact under this section and such entries are evidence on which a Court may act. *Abdul Hamud v Airon Chandia*, 7 C W N 849.

Entries in a : Court of fact to
hold that disputed at the time of the
Permanent Settlement at the boundary
Ramnandan v.
that the state
survey maps existed at the time of the
State v. Ward, 31-C L J. 111 A
time in connection with the measurement
is a rough register, statements entered in
affected thereby had notice

23 C. 552.

In case of dispute between Thak and
revenue survey map which was carefully and
officers and the *thakbust* map do not agree,

pillars, put down on the ground
existence; and they correspond with
the field book and the materials
ish sufficient data The revenue
signature of the revenue surveyor
on the thak map does not mean that if the thak map is reduced to the same
scale as the revenue survey map, then the two boundaries will necessarily agree
but merely that the surveyor has satisfied himself that the boundary accepted
and intended by the demarcation staff has been correctly picked up on the
ground.
3 Pat 85
A I R
Ranjan, 4
an v Ranjas,
Case 1027-
jah Mahendra
rule that a

the *thak* and the survey
clearly agrees with the
There is no general or
allow either the one or
the other, the Court may, if it considers the *thak* map more reliable,
follow that in preference to the survey map *Abad Hassen v Doucurry Pal*, 11
C. W. N 629

held that a topographical survey map of 1869 in which the boundary line
between the two *perqannahs* was given, was admissible in evidence under section
36 of the Evidence Act When *perqannah* boundaries are found entered in such

36 valuable evidence conclusive and contrary, they made. In cases of to possession boundary line on absence of better evidence, the lower Appellate Court erred in law in not accepting a Topographical survey map as evidence of possession at the time the map was made. *Gajhoo Damor v. Kotwar Jagatpal*, 11 C. W. N 239-9 C L. J. 415.

45 M. L. J. 444-50 C. 446-50 I. A. 121-(1923) M. W. N 511 The map is not the settlement map and the entire map is in a different notation and therefore the map, nor is it an independent piece of evidence. *Laharam v. Gurnukh Rao*, 99 Ind. Cas. 628-A I R 1927 204 Maps prepared under the Calcutta Survey Act have great evidentiary value as regards question of title. *Debendra v. Surendra*, 31 C. W. N 419-102 Ind. Cas. 370-45 C. L. J. 474-A I R 1927 Cal 345 A site plan prepared for

Warden of the Cinque Part was excluded and this decision was reversed on appeal in *Mercer v. Denn*, (1905) 2 Ch. 538, 555 A map prepared by a Commissioner entrusted with local inspection is only evidence in the case in which he was entrusted with such inspection. *Dinabandhu v. Anisatara*, 12 C L R 50

Under sections 36 and 83 a map prepared by a Deputy Collector particularly for the settlement of land forming the settled bed of a river is not admissible. *Kanto Prosad v. Jagat Chandra*, 23 C 335 A map prepared for one purpose is not relevant for another. *Leonath Mozumdar v. Durga Tarai*, 14 C 3 maps and plans were prepared by the Government for a private purpose, such maps and plans are relevant facts under section 36 of the Evidence Act. *Rahimmatulla v. Secretary of State*, 112 P. W. N 1012 112 P. W. N 1919-18 Ind. Cas. 1012

Though a Rennell Survey is valuable evidence on not conclusive of its non-acceptance. N. 1113; see also *Secretary of State v. Haradas Acharya v. The Secretary of State*, 26 C L J. 590 A map prepared by a kamungo is not relevant under this section. *Tarai Sarfar v. Fakrani*, 13 C L J. 450

maps and *chittas* are given. Maps and plans prepared under this section. *Rahim* Cas 799.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor General of India in Council, or of "any other legislative authority in British India constituted for the time being under the Indian Councils Act, 1861, the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909,"* or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any Local Government, or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact.†

Relevancy of statement as to fact of publication contained in certain Acts or notifications.

tence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor General of India in Council, or of "any other legislative authority in British

India constituted for the time being under the Indian Councils Act, 1861, the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909,"* or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any Local Government, or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact.†

Legislative recitals—Principle The general grounds of reception are (1)

sometimes advanced (*vide R v. Sutton*, 1 M & S 532, 549)—cannot otherwise suffice to give it any weight as evidence in controversy) But, next, it is clear the authority to inform itself

was in fact the distinction

of a statement in the recit

* Substituted by Act X of 1914, Sch 1

† The last paragraph added by s 2 of the Indian Evidence Act, 1899 (5 of 1899), was repealed by the Schedule II of Act X of 1914

follows: "Any
 idia in Council,
 reinafter to be pas
 l such Courts an
 cited" This has been incorporated in this section.

though
 nclusive
 uly m
 ot as determinations of controverted
 be made evidentially conclusive
 1352; see also *Harrat v. Wise*, 9 II
 C. 712; *R v Greene*, II A. & E 518; *R v Franklin*, 17 How St Tr 636;
th. Gen v. Bradlaugh, 14 Q B D 667 So a legislative declaration of fact
 at are material only as the ground for enacting a rule of law—for instance,
 at the use of public one may not be held conclusive by the Courts; but a
 -claration by a Legislature concerning public conditions that by necessity and
ock v. Heigh, 256 U
 se, the recital may
 W ignore § 1352

principle admissible The executive cannot be supposed to need express authority

Canada).

Government Gazette The Government Gazette is admissible and suffi
 ent evidence of such acts of the executive or of the Government, as are usually
 unations and the
 8 Price 89 For,
 the publisher to

nature proof of the publication under due authority *Goodere* Lx 307 The
 Government Gazette is also evidence of various Acts of state at common law
R. v. Holt, 5 T R 436, *A G v Thealstone*, 8 Price, 89, *Faylor* § 1662; *Php*.

- S. 38 *Ev. 4th Ed. 711.* The appointment of an officer may be proved by the government Gazette. *R. v. Gardner*, 2 Mod. & R. 363, where the division of a parish. The Gov of sale, and a printed paper in the Gazette, and issued from t were admitted in evidence to *Jatindra v Brajo*, W. R. (8864) 5 conclusive even where such knowledge is presumed from the publication of fact in the Government Gazette *Harriet v. Wise*, 9 B. & C. 712.
- Gazette of India Previous to 1863, the Government of India had an exclusive organ of its own; its notifications, orders, etc., being published in the of the Local Gazettes of the Local Governments as was necessary. In 1863, as the Gazette of the Government of India was published in the Gazette of India, 1863 was passed to give to publications in any other Gazette in the publication was prescribed by the law then in force. Vide s. 1 of Act XXXI of 1863; *Field's Ev 7th Ed 159*

document constantly used and referred to, are to be assumed genuine. principles, however, are in fact usually involved, first, the admissibility of a document proved to be printed by official authority, as hearsay evidence of the contents of the original and secondly the presumption of genuineness of a particular document.

proof of its being bought of the Gazette printer, or where it came from. *Ev. 4th Ed. 711.* § 2151 The Indian Evidence Act enacts: "The Court shall presume that a document is genuine if it is proved to be printed by official authority." *The Court shall presume*

known or observed by all and in which persons in general have well as which is done by an officer of the Government, executive, legislative or judicial.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Principle. There is no reason why an officer may not be authorized to give printed copies as well as to give written copies; nor has there been any doubt that such authorized copies are admissible. Yet it cannot be said that such an

had their source, not so much in a doubt of any of these principles, as in the

be copy rather than the authority to furnish it that the difficulties have arisen, *Wigmore* § 1631. "Not that the printed Statutes are perfect and authentic copies of records themselves, but every person is supposed to know the law, and therefore the printed Statutes are allowed to be evidence because they are the prints of what is supposed to be lodged in every man's mind already. *Butler J. Trials at Nisi Prius*, 225. The reason of their reception is thus stated by *Duncan J.* publication of mistake authentic danger Statute King's for by

t affords to all parties, and en the States. The rule, too, nger of abuse, and error or rry, 28 N H provides that be printed

law authorized reports of foreign countries would be admissible to show the reports of the domestic Government as well ld not be admissible. Taking every thing seems, to extend the meaning of the section of India, Great Britain and other foreign countries.

Mich 196

38.

by an expert witness (Fildes 45)
copy? It is usually said that
that the state of Statute, but a

1 rarely prevailed, except that
Statute already proven by copy
Corp 161, 174; *Pictou's Trial*
178, *Alvan v. Furnival*, 1 C. M. & R. 291; *Millore v. Heinrich*, 4 Camp 1;
Baron de Bode's Case, 8 Q. B. 250; *Cocks v. Parlay*, 2 C. & K. 270; *Nelson*
Bridfort, 8 Beav. 539; *Sussex Peerage Case*, 11 Cl. & F. 115; *Bremer v. Freeman*
10 Moore P. C. 362, *Green's Ev* § 488. The particular question is whether
evidence of a foreign "written law" should be presented in the shape of a
or merely by recollection testimony of one qualified to know it. *Higmore* § 12.
In *Baron de Bode's Case*, 8 Q. B. 250, *Patterson J.* said: "I quite agree that
witness conversant with the law of a foreign country may be asked what in
opinion the law of that country is. But I cannot help thinking that as
as it appears that

1
I may we rule should not be the same in the case of a foreign writ
law. I think the rule would be just the same if the question related to the
French Code as existing at this moment. If a witness were asked what the law
now is with respect to a bill of exchange in France, and were immediately con-
sidered as to whether that law was not in writing, and answered that it was
I think a copy of the law must be produced. So also *Justice Story* says:
"Generally speaking authenticated copies of the written laws, or other public
instruments of a foreign Government
not to be presumed to be
authenticated, which
justice in foreign courts
foreign Government
on *Conflict of Laws* § 640.

According to this section evidence of foreign statute law can be given by
the authorised copy of the Statute of the foreign government. But section 4
of the Act says that it can be proved as well by the opinions of persons specially
skilled in such law. Now the
proving a foreign statute, or
different circumstances. The
"But the answer to this is clear
purely and simply directed to the contents of a specific Statute, the proof of
be by copy of its terms. But in the usual case this is not the question. The
inquiry is as to the state of law at the present time or at a given time past.

ter accuracy, would
so other material elements
If in *Baron de Bode's Case*
270, note notes under s 35. But in some cases a copy was required.
Harford v. Morris, 2 Hagg Cons 430; *Boendlin v. Schuetler*, 3 Esq 30; *T. L.*
v. Levy, 3 Camp. 168; *Miller v. Heinrich*, 1 Camp 135; *Alves v. Johnson*, 1 T. L.

The books are produced, but the witness, describes them as authoritative Proof. of the law itself, in a case of foreign law, could not be taken from the book of the aw, but from witness who described the law. If the witness says, 'I know the aw and this book truly states the law,' then you have the authority of the witness

Majesty's Dominions to ascertain the law of that part. *Phip Ev 4th Ed. 359; Lord v Colman*, 1 D & S 21; *Logan v Princess of Coorg*, 30 Beav, 632=1 Jour. O, S 109. So also by Stat 21 & 25 Vict Ch 11, a similar case may be stated for the opinion of a Court in any foreign state with which His Majesty may have entered into a convention for ascertainment of such law. *Phip Ev. 4th Ed 359* An unauthorized translation of the Code Napoleon is not a work to which reference can be made under this section. *Christian v. Delanney*, 26 C 931=3 C W. N. 611 Under this section the Ceylon Insolvency Ordinances might be looked at to decide the question of the defendant's liability. *Denanayagam v. Muthu Kumar Suamy*, 14 Ind Cas 560

admits authorized as well as unauthorized Law Reports when the latter is recog-
or shall
ded by
report

always been done and ought to be done. A judgment is none the less an authority because it has not been reported, otherwise the question of whether or not a judgment could or could not be regarded, would depend upon the mere whim of the Reporter. I therefore respectfully dissent from the view on this point expressed in the case reported in 4 C W N 732. *Brett and Banerjee JJ.* concurred with him; see also *Trustees, P. D. v. Venkata Chalam*, 92 Ind. Cas.

S. 39. 710 An unauthorised report of a High Court case is entitled to respect. L J 153=A I. R 1925 Nag 414 Unauthorized reports are on the footing as an unreported case 24 O. C. 319.

HOW MUCH OF A STATEMENT IS TO BE PROVED

39. When any statement of which evidence is given forms

What evidence is to be given when statement, forms part of a conversation, document book or series of letters or papers part of a longer statement, or of a conversation or part of an isolated document, or contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made

Principle

ing of an utterance word in another part of a statement is modified by a prior or subsequent clause; one sentence qualifies another; and one paragraph may form only a part of the whole exposition. We must compare the whole, not because we desire the remainder for its own sake, but because without it we cannot be sure that we have the true sense and effect of the statement. If parts of a statement are taken out of context, they may be misunderstood.

ent or subsequent words or the thing produced, and give

Lawyer, J. Trials in N. C. 24 O. C. 319

person making the statement; for thus alone can the whole of what the person making the statement said be known.

How St Tr 257 In *Algernon Sidney's* arguing passages piecemeal said "My lord, you will make all the penmen of Scotland say David of saying, there is no God." L C J the sen.

angelists of saying, "I was not they were drunk." It is part of it that explains a trifled with a little. It is

in heart, There is no God. Now here

the admission of an opponent and to inconsistent statements of a witness used in impeachment. Where a series of letters in a correspondence, or of entries in an account-book are involved, it is sometimes difficult to draw the line between

those which are in effect part of the same statement and those which are not (*Call v. Howard*, 3 Stark. 6; *Sturge v. Buchanan*, 10 A & E 59; *Roe v. Day*, 7 C & P. 705). But it seems that so far as the letter or oral statement put in as an admission was written or made in reply, or contains within it a reference to a

under section 33 *Prince v. Samo*, 7 A & E 627

Abbot C J in *the Queen's Case*, 3 B & H 297, observed. "The conversations of a party to the suit, relative to the subject matter of the suit, are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which might have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation—not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject-matter of the suit because it would not be just to take part of a conversation as evidence against a party without giving to the party what he said on the same subject, or the whole of the conversation." *Denman L C J* E 627

Denman L C J "We cannot assent to it. We will merely observe that it was not introduced as an answer to any question proposed by the House of Lords, and may therefore be strictly regarded as extra judicial, that it was not necessary as a reason for the answer to the question that was proposed, that it was not in terms adopted by *Lord Eldon* or any of the other Judges who concurred, that it was expressly denied by *Lords Redesdale* and *Wynford*, and that it does not rest on any previous authority." The Indian Legislature has wisely left to the discretion

is concerned, they are still governed by the provisions of section 27 which must be construed as favourably to the accused as possible for it is a section which makes an exception, namely sections 25, 26 and 27. *Sakhan v. Emperor* A I R 1929 Lah 341. Because a document is admissible.

first, whether the party

other parts, of the conversation, document, whose statement it is, may afterwards, by remainder, or other parts, or other statements

THE INDIAN EVIDENCE ACT.

S. 40.

in Bankruptcy Such judgments
her parties or strangers Such

Judgments in personam are all

bind only persons not so affected

Co Lit 271

donor or do

ancestor and

executor, intestate or administrator, tenant and (3) In law (or representation) as testator and

successive incumbents The

parties, viz, that a party of

manner as the original party

of their legal effect, as distin,

(Cockle Cas 14)

The distinction between judgments in rem and judgments in personam was

thus laid down by Blackburn J in *Casrique v. Imrie*, L R 4 H L pp 477-

120 Some points are clear Where a tribunal, no matter whether in En!

or a foreign country has to

judgment

country

rights of ti

exercise of that jurisdiction direct that the thing, and not merely the interest

of any particular party in it, be sold or transferred, the case is very

different Whatever it settles as to the right or title, or whatever disposition it

makes of the property by sale reason

val, i in

special jurisdiction has also been defined as a judgment by a Court having

274, 278); such judgments operate as *M Dannel v Alcorn*, [1891] 1 Ir R

Pratt v I D 1

publicity attending such judgments; secondly, on account of the principle

Interest reipublicæ ut sit finis litium (It concerns the state that there should be an end to all law suits) Hence the maxim, *transet in rem judicatum* The

gment and also

principle is that

solemn character, must be presumed to be faithfully recorded), but that it
between the
Ev 10th
up Ev.
Allyn,
1st 361;

relevancy of
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the judgment

partes, except where the judgment is clearly *resjudicata*. A judgment other than a judgment referred to in ss 40 to 42 may be admissible to prove that a right was asserted or denied under s 13 of the Evidence Act or to explain or introduce facts in issues or to explain the history of the case *Purnima v Nand*, 12 Pat L. T. 582—A I R 1932 Pat 105 The law of evidence does not make a

one suit
t *Tulsi*
applies
should

not do so because that matter has been decided before *Lakshman v. Ramdas*, A I R 1929 Cal 374 (F B)

Judgment, meaning of The word judgment in sections 40—44 means any final judgment, order or decree of any Court *Step. Dig Et* art 32

Scope of the section This section deals with judgment *in personam* and *is v Bapu Ashok*, 10 B 439, *anj v Dipa*, 3 B p 3), it is plain

40. 2 of Act VIII of 1859 was to be construed as including a material issue, and we think that, similarly, the terms 'taking cognizance of a suit' may be construed as including a material issue in the suit between the same parties; in other words, that section 40 was intended to include cases in which the general law relating to *res judicata inter partes* as then understood applied. This section provides that the existence of a judgment, decree, or order is a relevant fact, if by law it has the effect of preventing any Court from taking cognizance of a suit or of holding a trial. *Per Mitter J in Gugu Lal v. Fateh Lal*, 6 C 171 (176). In the same case (44th C. I. at p. 170) said: "It is true that s. 40, might

Khoti Act, conclusive and final evidence of the liability thereby, and the Civil Court cannot look behind the entry. And, under the circumstances mentioned above, the evidence of a decision otherwise relevant under s. 40 of the Act, is not a date of the survey entry, but the date of the entry.

have been shown to the suit.

the record is the entry. *Ram*

Balbin, 21 B 235, *Gopal v. Dasarathi*, 21 B 244; *Gopal v. Mogeswar*, *Antay v. Madhab*, 21 B 480. Where a subsisting judgment, order or decree, relevant under this section is set in by one party as a bar to the claim of the other, the Court

judicata or otherwise under some other rule. It is a question of fact, and not a question of law, as to whether the plea of *res judicata* is not a plea as to the merits of the case, but a plea as to the jurisdiction of the Court.

to a point in issue. *Udamauthal v. Parameswara*, 85 Ind Cas 460 = A I R 1925 Mad 1019.

Principle. The doctrine of estoppel is a fundamental doctrine of all Courts that there must be an end of litigation. *Re May*, (1885) 23 Ch D 516 (C 4). Judgments being public transaction of a solemn nature are presumed to be faithfully recorded. Every judgment is therefore, conclusive evidence for or against all persons of its own existence, date and legal effect as distinguished from the accuracy of the decision rendered. *Phil Ev* 7th Ed. 392.

Foreign Judgment. A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularity which do not affect the jurisdiction of the Court do not vitiate such judgment.

... of the foreign Court, render the ...
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 ... shall be conclusive as to any matter ...
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 under whom they or any of them :
 (a) where it has not been pronounced : b)
 where it has not been given on the merits of the case; (c) where it appears on
 incorrect view of international
 India in cases in which such law
 which the judgment was obtained
 are opposed to natural justice, (e) where it has been obtained by fraud; (f)
 where it sustains a claim founded on a breach of any law in force in British
 India."

So a foreign judgment operates as *res judicata* except in the six cases specified in section 13 of the Civil Procedure Code of 1908 *Bababhai v Narharbhai*, 13 B 224 "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced." *Per Parke B in Williams v Jones*, 13 M & W. 633, *Russel v Smith*, 9 M & W 819, *Goddard v Gray*, L R 6 Q B 139

So where the subject matter is a *res* so situated as to be within the lawful control of the state under the authority of which a Court sits and that authority has conferred on the Court jurisdiction to decide as to the disposition of the thing and the Court has acted within that jurisdiction, that decision is conclusive,

they are final and unalterable by the Court pronouncing them *Duchess of Kingston's Case*, 2 Sm L C 731, *Ricardo v Garcias*, 12 Cl. & F 308; *Nonvion v. Freeman*, 15 App Cas 1

Previous Judgment to bar a second suit A judgment which is not a judgment *in rem*, is not admissible in evidence against those who are neither parties to it nor derive title through such parties, as proof of the facts determined therein. *Kesho Prasad v Kistanath*, A I R 1926 Pat 577-97 Ind Cas 282 Under section 40, the existence of a decree is a relevant fact when the question is whether in or to hold the

would also conclude the trial of the question as to what the rate of rent at the date of that suit was if the decree showed that that question was heard and finally decided in that suit *Ibid* "It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision. If the decision was wrong it ought to have been appealed against." *Per Lord Macnaghten in Badar Bee v Habin Merican*, (1909) A C at p 623, see also *Huntley v Gaskell*, (1905) 2 Ch 656; *Mangna v Wright*, (1909) 2 K B, 958, *Humphries v Humphries*, (1910) 1 K B 796

Res judicata by general principles of law Where a matter has been

S. 40. 2 of Act VIII of 1859 was to be construed as including a material issue, and we think that, similarly, the terms 'taking cognizance of a suit' may be construed as including a material issue in the suit between the same parties; in other words, that section 40 was intended to include cases in which the general law relating to *res judicata inter partes* as then understood applied. This section provides that the existence of a judgment, decree, or order is a relevant fact, if by law it has the effect of preventing any Court from taking cognizance of a suit or of holding a trial. *Per Mitter J in Guggu Lal v. Fatch Lal*, 6 C 11 (176). In the same case *Garrh (J)* at p 170 said "It is true that s 40, m. 1 have been VIII of Dayee was in

whether civil or criminal, from taking cognizance of a suit or trying any particular issue. The words 'holding a trial' are amply large enough to admit of this construction, and it is not because in some other Act the words 'holding a trial' may have been construed to refer to criminal trials only, and we ought to confine their meaning in the same way in s 40 of the Evidence Act. See also the judgment of *Mitter J* in page 176. A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, *Ex parte Official Receiver*, (1896) 1 Q. B. 100. It and second actions are different, the directly (not collaterally or incidentally) in a second action between the same parties. *Prietman v Thomas*, 9 P. D 210 C A; *Halsbury Vol XIII* p 83. An entry in a record prepared under s 108 of the Bombay Revenue Code, by the Survey

shots have never received the conclusive effect of the entry have been shown to the survey the record is the entry *Ram*

Balbir, 21 B 235, *Gopal v. Lushun*, 21 B 480. Where a subsisting judgment, order or relevant under this section is set up by one party as a bar to the claim of the other, the latter can show that the judgment, order etc., was delivered by a Court without jurisdiction or was obtained by fraud or collusion, and it is not necessary

Bansi Lal v. Dey, admissible judgments own as plea of res section has nothing to judgments because

a plea of *res judicata* is not a plea as a matter of evidence, but only a plea of law, barring the action on a plea of *res judicata* is distinguished from the rules of evidence.

also *Sita* contain to a pair

460 = A I R 1925 Mad 1019

Principle The doctrine of estoppel is a fundamental doctrine of all Courts that there must be an end of litigation. *Re May*, (1885) 28 Ch D 516 (C.A.). Judgments being public transaction of a solemn nature are presumed to be therefore, conclusive evidence for or against, date and legal effect as distinguished

Philp Ev 7th Ed 392.

Foreign Judgment A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment.

only when it is so pleaded, or there is an opportunity of so pleading it. Otherwise it is only a relevant fact from which the Court may draw a conclusion in favour of the person who tenders it as evidence. *Vooght v. Winch*, 11 B & Ald 662.

But "the plea of *res judicata* as a bar to an action belongs to the province of adjective law, *ad litem* *ordinatio* *em*; but difference of opinion prevails among jurists as to whether the rule belongs to the domain of procedure or constitutes a rule of the law of evidence as furnishing a ground of estoppel. In England, and I may say also in America, the rule is usually dealt with as belonging to the law of evidence."

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Sections
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suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

have been made
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granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI Where persons litigate *bonafide* in respect of a public

cause
cause 1

A judgment *in per*
record and their privies

S. 40. cannot answer the same question again in another action, although, perhaps,

there must be an end of litigation, otherwise there would be no security for any person."

Stay of
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instituted su
or any of
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relief claim
continued by the Governor-General in Council and having like jurisdiction, &
before

a suit in a foreign Court does not preclude
a suit founded on the same cause of
action. Vide section 10 of the Civil Procedure Code of 1908; see also *Micoy v Kasou*, 1 C L R 282, *Balkissen v Krishan Lal*, 11 A 148, *Ramalinga v Raghunath*, 20 M 418, *Venkappa v Manjurath*, 16 M L J 526; *Bissessar v*
C. A. 18 C. T. D. 112 D.

Din Shau v Galstoun 29 Bom L R 382-102 Ind Cas 229-A 1 A J 201
Bom 245; see also *Kuberan v Korman Nair*, 98 Ind Cas 421-48 M L J 201
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person entitled
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for its performance and successive claims arising under the same
shall be deemed respectively to constitute but one cause of action. Order II, rule
2, Civil Procedure Code

Previous Acquittals or Convictions. Section 403 of the Criminal Procedure Code 1908 - 11 1 1 1 follows - A person who

against him might have been made under section 236, or for which he
been convicted under section 237

A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged

Explanation The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused, or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section

Judgments how proved If a party offering a record does so in support of a plea of *res judicata*, or to show that he has acquired or his adversary has lost some title or right either by the judgment alone or by it and proceedings taken for its enforcement, the whole record so far as it concerns the formal stages, must be either produced or exemplified, and if exemplified, the exemplification must show on its face that the record is complete and is regular nor can the record be pitched with parol *Warton on Tithes* § 824 Before any document, whether an original or a copy, can be received in evidence of a judicial proceeding, it must, in general appear that the record or entry of such proceeding has been finally completed *Taylor Ex 10th Ed* § 157C

Judgments not relevant under ss 40 to 43 R was charged with the offence of defamation and convicted The complainant then sued R in damages

41 A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant

Relevancy of certain judgments in probate, etc., jurisdiction

Such judgment, order or decree is conclusive proof—
that any legal character which it confers accrued at the time when such judgment, order or decree came into operation,
that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, * [order or decree] declares it to have accrued to that person,

that any legal character which it takes away from any such person ceased at the time from which such judgment, * [order or decree] declared that it had ceased or should cease,

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, * [order or decree] declares that it had been or should be his property.

* These words in s 41 wherever they occur were inserted by the Indian Evidence Act Amendment Act (18 of 1892) s 3

THE INDIAN EVIDENCE ACT.

...every one who can be affected by the decision may protect his interests by becoming a party to the proceedings. In addition to which it is to be remembered that a decision *in rem* not merely declares the status of the person or thing, but *ipso facto* renders it such as it is declared, thus a decree of divorce not only annuls the marriage, but constitutes, the debt or a adjudication in bankruptcy not only declares, but constitutes, the vessel prize, and bankrupt, a sentence in prize Court not merely declares the vessel prize, but vests in the captor *Phipson Ex 7th Ed 397*; cited with approval in *Venkataramananayya, A I. R 1931 V 7*.

tion pronou

the status So a judgment *in rem* may be defined as the judgment of a Court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a party to the litigation) (*Castrigue v Inrit, L. R 4 H L 414, 423*) Apart from the application of the term to persons it must affect the *res* in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer *Halsbury, Vol XIII, p 327*.

Scope of the section Th...

the purposes for which the judgment of a competent Court operates as conclusive against the world, and so far as such purpose relates to the status or what is referred to as legal character of a person, it specifies three purposes only: it

is conclusive against all the world as to that status, whereas in a judgment in

B. 455—65 L. J. Q. B. 616—75 L. T. 95.

is thus supposed to be a party. *Nort. Ev.* 214; *Cunningham Ev.* 184. The four
J. C. A.—87

S. 41. classes of judgments, etc. which alone are to be conclusive, affect it will be observed, the status of a person.

when the judgment declares it did or should where the vesting is in futuro. *Mad. Ev.* 215. *Radhakessun v. Mt. Gangabai*, 22 S. L. R. 105-1923 Sml. 1.1. Judgments declaratory of title.

therefore a judgment is conclusive. 1923 A. 393.

54 M. 727-A. I. R. 1931 Mad. 474.

Probate Jurisdiction. The Courts in India exercise the Probate jurisdiction under Act XXXIX of 1925.

section has been frequently applied to cases of persons after the Hindu Wills Act came into force shows this. The only legal character when the Probate Court declares a person to be entitled to is that of executor. It confers the character of administrator. It does not declare it. So the section would be meaningless unless "legal character" included the office of an executor. I do not think that the circumstance that in the particular case the powers of the executor may be limited, makes any difference in the construction of the section."

is only granted after satisfactory evidence as to the testator's capacity on the part of the testator. *Jones v. Jones*, 1923 A. 393.

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v. Duke of
v. Conche
Griffiths v.
Harris, 11

to probate must be taken to have been conclusively determined and therefore probate is conclusive proof of the due execution of the Will which is the foundation of the title of the executor. *Chandreshwar v. Bisheshwar*, A. I. R. 1927

R. v. also *Ratabundiy v. Yanamandya*,
79 1 C 360; *Mayho v. Williams*, 2
N. : *Anjanabai v. Ram Das*, 4 C. W.
N. clxxvi; *Chuna Sami v. Hariharabarda*, 16 M 380; *Jagan Nath v. Rangit*, 25
C. 354; *Mt. Phekn v. Mt. Alanki*, 9 Pat. 693-128 Ind. Cas. 128-A I. R. 1930
Pat. 618.

Court in such matters is conclusive. See also *Field Ev* 335

in a Common-law Court, either
he executed the Will (*Mario*
not then in England (*Whitaker*
L. R. 29 Ch. D. 657), prove
the title of the executor, in which
1433. But where the points were directly in issue and actually decided by the

S. 41. Court between the same parties, or persons claiming under them, the judgment in rem will be conclusive evidence of the matters decided in it. *Spencer v Williams*, 2 L. R. P. & D. 230 = 40 L. J. P. & M. 45. For instance, if, in a suit for administration, the sole question be, which of the two parties is next of kin,

Probate Division, declaring that as fact has proved himself next of kin, and as such, will be conclusive evidence of the relationship of the parties in a subsequent action between them for distribution, instituted in another Court. *Barrs v Jackson*, 1 Phill. 582; *Bowdler v Taylor*, 4 Bro. P. C. 708, *Dochow v Crispin*, 35 L. J. P. & M. 129, *Thomas v Kettle*, 1 Ves. Sen.

execution of the Will, *Harmus v Bar Dahn*, *Ganesh v Ramchandra*, question was considered in *Raman Deb v Kumud Bandhu*, 14 C. 1. "The Judgement in a probate has been repeatedly held as subject to the law of limitation (in a special case)." *Ishan Chandra Roa*, 6 C. 707. A probate proceeding, therefore, while it enjoys the advantage that a decision it is clear from *nandan v Sheo*

by their very cause of action 21 B. 563. In conclusively as to the testator, and does not, in other words, the judgment of a Court by which a refusal, does not necessarily operate as a judgment in rem in the same way as a judgment by declares that testator with

No doubt, such a judgment if it has not been duly executed by the testator, it has not been duly attested may character of a Will, but even if

refusal to grant probate does not conclusively show that the will propounded is not the genuine Will of the testator. The decision may be based upon entirely different grounds, which do not touch the question of the genuineness of the Will. Such a judgment cannot operate conclusively unless it embodies a final decision against the genuineness of the Will. The learned Judges of the Bombay High Court while they lay down the proposition carefully guard themselves, however, against any expression of opinion upon the question whether, if an issue had been raised upon the question of forgery of the Will and had been decided, the decision might not be conclusive. "The true rule," thus formulated in the case of *Schultz v Schultz*, 10 Gratt. 358. When a Will has been propounded by a party interested and fairly rejected on the merits, it would defeat the policy of the law and be productive of many mischiefs, if it could be again propounded by the same party or by others who might be interested and the contest thus renewed from time to time. The sentence, therefore, against the Will must be regarded as a sentence against all claiming under it, it stands upon a footing analogous to the subject

ment of the matter in the same or in any other Court by in privacy with them, in other words, of the facts necessary to

a refusal to admit a Will to probate is conclusive of the facts necessary to support the decision. *Freeman on Judgments*, Vol. I, section 312 (1). O.

for probate by another person, for example, a legatee who claims an interest under the Will; if so, it would be futile to hold that an executor who has made default, cannot propound the Will again. *Raman v Kumud*, 11 C. W. N 924. The finding as to the execution of the Will of the Probate Court binds at any

as is contemplated in section 41 of the Evidence Act in as much as such judge

Ramoye, 5 Mys L. J 107, see also *Monmohun v Banga*, 31 C 357=8 C W N 197.

The expression 'legal character' in section 41, Evidence Act, when it has

Matrimonial jurisdiction This section enacts that a final decree of a competent Court in the exercise of matrimonial jurisdiction which confers upon or takes away from any person any legal character not as against any specified

- S. 41. (IV of 1869), does not make the proviso in section 17 applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge, and such a decree may therefore be treated as made by a Court of first instance, and to be applicable to a decree of nullity, the same before the six months' period has expired, cannot on that ground be treated as made by a Court of first instance. *Edward Caston v L H Caston*, 22 A 270 (F B). In a case decided before the passing of the Act, the decision was not binding on the court in the case or with reference to a side, and but it would be no evidence against that the two ladies were *Charan*, 7 W R 38-1. Whether the decision can judgment by a Court of first instance.

L R 4 H L 428) or maritime lien (*Minnacraig v Charbreed*, etc. *Linnacraig*, 1 Q B 460). A decree for enforcement of maritime lien by a Court of Admiralty is a judgment in condemnation of property as forfeited, and also is a judgment in rem. *Geyer v Aguilor*, 7 T R 696, *Maingay v Gahan*, Ridge, L & S 1, 18.

is barred by the previous decision which is a judgment in rem. *Narayan v Hardutta Rai*, 16 N L R 201. The decision of the Insolvency Court amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely as against him, but absolutely, within the meaning of this section. *Pitaram v Jhuphar* 33 Ind Cas 793, see also *Mussamat v Mathura*, 40 Ind Cas 102, *Bhairo v P C Das* 17 A 1 100.

even if it could be held that the decision was not a judgment in rem. *Narayan v Hardutta Rai*, 16 N L R 201. The decision of the Insolvency Court amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely as against him, but absolutely, within the meaning of this section. *Pitaram v Jhuphar* 33 Ind Cas 793, see also *Mussamat v Mathura*, 40 Ind Cas 102, *Bhairo v P C Das* 17 A 1 100.

Madras v. Off. Assignee of Rangoon, 46 M. L. J. 580=1924 Mad. 662=31 M. L. S. T. (H. C.) 90=83 Ind. Cas. 171, see also *Radha Kishen v. Mt. Gangabai*, A. I. R. 1928 Sind 121=22 S. L. R. 105. An order adjudicating a person an insolvent and vesting his property in the Official Receiver no doubt operates as a judgment *in rem* but the grounds on which the order is based has no such effect. *Radha Kishen v. Mt. Gangabai*, A. I. R. 1928 Sind 121=22 S. L. R. 105.

Legal Character.

The legal character and legal status of the person

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it were with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general. *Rama Krishna v. Narayana*, 39 M. 80=26 Ind. Cas. 883.

ing must have been declared not as
A decree declaring that A is entitled
t only made against a specified person,
so it is not conclusive proof of title to a debt. *Venkataramanayya Pautulu*,
54 M. 601=A. I. R. 1931 Mad. 441=61 M. L. J. 229 (S. B.) Similarly a right
to recover a debt or a chose in action cannot be deemed to be a "specific thing".
Ibid.

f an issue as to the age of a
of the guardian for person,
proceeding, is not one of
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administration
her father,
sly been made under the Guardians
idow for a declaration that she was the
infant son of the alleged testator,
by the present petitioners who claimed
to be testamentary guardians of the property appointed by the Will now
propounded, and that the
question of genuineness of t
proceedings under the Pro
haraborda, 16 M. 380. A ju
adoption is not admissible
matters decided therein. *Guru Mahadev v. Jagatray*, 71 Ind. Cas. 929, *Kanhya*
Lall v. Radha Churn, 7 W. M. 338, *Yarakalamma v. Ana Kala Naramma*, 2 M.
H. C. R. 276

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haraborda, 16 M. 380. A ju
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Lall v. Radha Churn, 7 W. M. 338, *Yarakalamma v. Ana Kala Naramma*, 2 M.
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Judges, when taken apart from the reasons on which it is founded, is not
entitled to much weight, it being merely a
decision of a

Administration - was not in issue in the proceeding relating to Lath
1926 Rang 202; see also *Oates v. King Emperer*, 38 C. L. J. 163.

42. Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the inquiry; but such judgments, orders or decrees are not conclusive proof of the truth of the facts which they state.

Illustration.

exists, but it is not conclusive proof that the right

not as res
parties, provided
for the C

s section judgments
whether between the
see also *Collector v.*

S.

such as the existence of custom in succession in particular communities. Such

regarded as a species of reputation,—will also be received and this too, whether the parties in the second suit be those who litigated the first or be utter strangers.

when admitted, will so far vary, that they will be bound by the previous suit be strangers to the parties in the inclusive. *Reed v. Jackson*.

Even before the enactment this country. *Doorga v.*

Narendra, 6 W. R. 232; *Madhab v. Thomas*, 7 W. R. 210, *Totaram v. Mohan*, 2 Agra 120; *Venkata v. Subba*, 2 M. H. C. 1.

Origin of the Rule It has often been said that verdicts of juries, and judgments, decrees, and orders of Courts of competent jurisdiction, are evidence of reputation, and possibly when juries were summoned *de vicinato*, and were consequently assumed to be acquainted with the subject in controversy this may

as were admitted,
said "Reputa-
is case; a *fortiori*
lays there is no

Hearsay Rule *Wigmore* § 1593 Because "that was when the jury was summoned *de vic*
Per Alderson B
early part of the
verdict was a c
Pre Treat Ev 90
nor a Judge's c

S. 4
 setting up
 of a High
 go of the
 42 of the
 trustees of a
 es money
 gments in
 have been

decreed in favour of the trustees of the temple were relevant under s 42 of the
 Act as relating to matters of a public nature *Ramasami v Appavu*, 12 M. 9

to show that shrine *Sri Ganesht v.*
Keshavrao, 15 *ecretary of State*, 16 C 173
 (183) Where daughter's son in sanc-
 tioned by custom amongst *Dehasitha Smarth Brahmins*, decisions in suits in which

who made it. *Lanuarial v Shoochand*, 85 Ind Cas 795=A I R 1923 Lah
 884 When a question of status is in issue, judgment and orders between the
 a case, rent suits, suits for
 are of high evidentiary value
Jumtal v Mt Hulki, A I R
 ough a judgment not *inter partes*
 as a fact in issue, or as a
 recitals in the judgment cannot
Kashinath v Jagat Hishore,
 20 C W. N. 643=23 C L J 583=35 Ind Cas 298; see also *Ram Ranjan v*
Ram Narain, 23 C 533 (P C); *Bhutto v Kesho Prosad*, 1 C W N 265=24

of a 'public nature' within the meaning of section 42, and the judgment of the

5. 43. Faridkot Court is not therefore relevant as relating to a matter of public nature *Ibid*.

43. Judgments, orders or decrees, other than those mentioned in sections, 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act

Illustrations.

A obtains a decree against C for damages on the ground that C made out his justification. The fact is irrelevant as between B and C

A wife
tion As b
(d) A
murders A in consequence

The existence of the judgment is relevant, as showing motive for a crime
* (e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue
* (f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue

Principle It is well settled that a judgment in personam is not admissible in a suit between strangers or a party and a stranger except in a case where it is settled, the judgment is tendered against (R v Foulkes, 1859, 11 Q B D 1028), sometimes as hearsay (Step Art 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 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978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

could not make defence
legitimate ground for a
satisfactory reason for
that the objection of *res*
solemn acts of strangers if relevant to the issue *Phil Ex 101*
where the instance of judgments, orders or decrees is a fact in issue or a relevant
fact under some other provisions of the Act, the judgments, orders or decrees

however, there is a highly important limitation. A judgment

*This Illustration was added to s 43 by the Indian Evidence Act (Amendment Act, 1891 (3 of 1891) s. 5

sible for proving the truth of what it asserts may be valuable as evidence for some other purpose. Its very existence may be a fact in issue, and then of course, evidence of it may be given; or it may be a fact relevant within some So mis- 0, 41 or 42. So the cases referred to in this section are such, as the section itself

or 42. So the cases referred to in this section are such, as the section itself

taking this view I am doing any violence to the language of s 43 of the Evidence Act, which, if I understood it aright, declares that judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 are of themselves irrelevant, that is in the sense that they can have any such effect or operation as

which the partibility of the estate was asserted and recognised. The reason upon and cannot be so than the transaction *Tobinda v. Shanulal* 1 C W N 521 P C out if they are not

inter partes unless there existence of such judgment is a fact in issue or is relevant under some other provisions of the Act. The existence of the judgment may be relevant but not the decision of the Judge or the opinion expressed by him. It is immaterial if the defendant on both cases is the same and the decision of the Privy Council in 22 C 533 is no authority for the general proposition that a judgment against a party can always be used against him in a subsequent suit by another person. *Benodelal v Secretary of State*, 34 C W 1113-A I R 1931 Cal 239. So recitals of judgments not *inter partes* of relevant fact are not admissible in evidence. *Asa Ram v Mausha*, A I R 1930 Lah 237.

Existence of judgment etc is a fact is issue / If the object of the judg

even though his name appear on the back of the bill, or of his malice, or of

S. 43.

l v. Marumara, 9 East 361; *Inclusion v Barr*
hika, 11 W. R. 339; *Keramat v Gholam* 9
 notwithstanding the verdict is still at liberty to
 r § 1667 - but see *l v. r. Shewer* 11 4

will apply to other cases, wh
 or the like *Pouell v M*, 4
 158, *Griffin v Brown*, 2 Pick 504. In
 defence was that the plaintiff had received
 satisfaction of his damages, it was to
 that the plaintiff, on traversing this plea, might put in evidence a judgment
 recovered from him by the assignee of the principal for the amount so received
 as conclusive proof that the money had

29 L J Ex 270

Watson v Little, 5 H L J 1

Irrelevant under some other provisions of this Act. Ordinarily a
 judgment not inter partes is
 in *Lal*, A I R 1929 Lah 137
 regards the value of the estate
Nageshar v Hanuman 5 1/4

A. L. R. 10 (Kev)

In a suit

binding on

by the same

part of the land in suit was not binding on the ground of the issue
 ancestral, can only be treated as admissible for the purpose of showing that
 on former occasion the right of the alienor to alienate part of the property
 suit was called in question on the ground that the property was ancestral
 The finding of the Court in the previous suit that the property was ancestral
 is not relevant *Partap v Mothu*, 11 Lah L J. 492=96 Ind Cas 293=27 F
 L A 544

the fact

Harih

Where

not relevant

with

trans

previous decisions in Land Acquisition cases are relevant in a suit
 where the market value of the land in the same neighbourhood is
Madan Mohan v Secretary of State, 78 Ind Cas 557.

5 Pat. L. W. 97 = 43 Ind. Cas. 393.

One N, who was a usufructuary her right to recover profits in that sh defendant for a number of years. R dant's name continued to be recorded as the defendant and R

present suit for a declaration that the , the lease in his favour having come to The defendant pleaded an arrangement

the unex
mortgage
pleaded b
admissible
Mahomed

Reca
Satindra v.

possession was claimed or disputed, and also as evidence to show that there was such a j determine w trial should c

n an action for
his land by the
was accidental

of the executants of a bond on which a suit had been brought, directed the prosecution of the plaintiffs in for the offence
Raj Kumari
Sarina v. Kash

Kalpada, 28 C. W. N. 587. But p. 618, Ghosh J said "I am not prepared to say that the decision in the civil suit would not be admissible in

, and what the land in
Nath v. Mahomed Wafiz
P. C) = 6 C. W. N. 337.

- S. 44. Judgments, etc are admissible, meaning of The general principle is that the mere existence of a judgment, its date and legal consequences, are conclusively proved, as against all the world, by the production of the record, but that even though, as between the parties, the judgment must have been proved. The

sively -
the pr
used in
W N 402 Judgments and decrees recognizing rights between parties to a suit or between persons whom they represent are not conclusive but are admissible in evidence under s 13.
different from those in the former suit
Neamut Ali v Gooroo Das, 23 W R
Gopi v Kherod, A I R 1925 Cal 194.
in evidence in order to prove that there was a certain way, does not make all the recitals in the subsequent action *Abdul Latif v*
Cas 667, see also *Tripurana v Rokham*, 43 W L J 324 (F B) = 45 W L J 583; *Sarod v*
Krishnanath v Jagat Rishi, 100 F 100.
articles contains a recital of the
refers to a point in the
the respective claims which the
available, and the substance of the
pleading is narrated in the judgments, the judgments furnish evidence of the
allegations made by the parties on that occasion *Kailash v Byoy*, 72 Ind Cas 680, see also *Purbatty v Purno*, 9 C 586; *Bhaya v Pande*, 3 C L J 101
Byathamma v Arallu, 15 M 19, *Thama v Kondar* 15 M 378, *Krishna v*
Rajagopala, 18 M 73, *Malcomson v O'Dae*, 10 H L C 593, *Lejell v Ken*
(1889) 14 A C 437 *Neil v Devonshire*, 8 A C 135

44 Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, and delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Principle

between parties who were really not in contest with each other." This rule has been embodied in the Indian Evidence Act. *Barkumssa v. Fazl Huj*, 26 A. 262 (283). So under this section the defendant is entitled to show that the decree is obtained by fraud. *Ibid*, see also *Hara Krishna v. Ramchsh*, 62 Ind. Cas. 962=6 P. L. J. 373.

ties to a suit tenders or has
n 40, 41 or 42, it is open to the

lays down that any party to a suit or judgment, order or decree which is relevant under s. 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. *Pranag Kumar v. Siva Prasad*, 93 Ind. Cas. 385=A. I. II. 1926 Cal. 1=42 C. L. J. 280. This section was construed by *Maclean C. J.* and *Banerjee J.* in the case of *Rajib Pondey v. Lakhari Sindh*, 27 C. 11=3 C. W. N. 660 and it was held that a party to a suit can show that a decree

Boss, 30 C.
id is sought

a judgment, order or decree as barring a second suit or trial; section 41

- S. 44. case of fraud or collusion will have to be specifically alleged and substantiated by the party setting it up. *Baukantha v. Mohendra*, 1 C. L. J. 65. To set aside a decree on the ground of fraud, it is not sufficient to prove constructive fraud, but an actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance by that contrivance. *Bisher* R. 1926 Lah. 177. Where a fraud or collusion, such fraud or collusion as is contemplated by the Evidence Act, must be raised in the defence. *Ambika v. Kala Chandra* 10 C. W. N. 422 (424). Where a party seeks, under section 44 of the Evidence Act, to avoid a judgment on the ground that it was delivered by a Court not

111 Ind. Cas 762 = A. I. R. 1928 Pat. 675.

Not competent. The words "not competent" in this section refer to a Court acting without jurisdiction. *Kellamma v. Kelappan*, 12 M. 229 (231). "Jurisdiction may be defined to be the power of a Court to hear and determine

in "jurisdiction" which has been stated to be "the power to hear and determine issues of law and fact,"

v. Dhanraj 193. This jurisdiction is to place, value, and may be exercised within

pronounced by a Court without jurisdiction is void. *1914* void and a nullity it is not only the duty of the Court which passed it to set it aside. *Mohan v. Mahesh*

Lal, 17 A. 478; *Haji Musa v. Purman* *Vaithinathan*, 38 M. 682; *Roop Naram v. Narendra v. Gopal*, 17 C. L. J. 634. One must not

pronounced, for the power to decide necessarily carries

decide wrongly as well as rightly. *It*
 723=31 C. L. J. 482. In *Mallarjun*,
 5 C. W. N. 10, Lord Hobhouse said:

W. N. S.
 (347)=
 wrong

Moomraj, 45 C. L. J. 24.

The plea of *res judicata* can be satisfactorily met by showing that the judgment, in which the issues pleaded were decided, was delivered by a Court

To sustain an objection that the Madras Insolvent Court's order is a nullity conferring no title to the debtor's estate on the Official Assignee, it is obviously not sufficient to prove that the order was wrong. To hold otherwise would virtually erect into a Court of appeal from the Insolvent Court, not only this Court, but every Court in which the (and would be inconsistent with section 41 Act. What, then, is the test of whether

S. 44. Mere delay in raising it cannot itself be fatal objection when a fresh execution sought. *Sheo Tahal v Binack Shulul*, 1931 A L J 613-1 I R 1931 418 689, see also *Panchhari v Girdharimel*, 89 Ind Cas 317, *Veerav Muga* 33 M 271 (F B)

thereof
nullity, a

made by a Court
41 and 44 of the Ind. Cas.
proof that the marriage
271 (F B)

un quam co habitavit (Fraud & 1
It vitiates the most solemn proceeding, O J in the *Duchess of Argyll*

Case, 20 How St Tr 355 It avoids all judicial acts, ecclesiastical or temporal. *Ibid*, see also *Shedden v Patrick*, 1 Macq 535 But the difficulty is that no definition is given in the Act of the word "fraud" This section provides that any party to a suit may show that any judgment was obtained by fraud. "It is clear" says *Martin C J* in *Bhulaji v Balwant*, A I R. 1927 Bom 610 "Bom L R 1046, 'that some limitation must be put upon that section. For instance if party A, and his witnesses in a particular suit came into the box and committed deliberate perjury on material points, that is clearly fraud. On the other hand if a decree is eventually passed in favour of that party, even on the perjured evidence, it cannot be a ground to the opponent to start a new action exactly the same evidence wrongfully believed by doctrine of *res judicata* party might alternately

Consequently the authorities show, I think, that if the case merely in effect, a re-hearing of the previous suit on substantially the same evidence then the Court will not hear the second suit. On the other hand it is clear that in a proper case the Court has jurisdiction to set aside a decree which has been obtained by fraud practised on the Court. If, for instance, the existence of certain evidence has been stoutly denied by one party and the Court has been induced to pass a decree on the basis that that evidence existed

circumstances are looked at, that in that case the Court would original decree'

In *Nanda Kumar v. Ram Jiban*, 41 C 99-19 C L J 457-23 Ind Cas 27-18 C W N 991 and The jurisdiction to

the decree being the principal point in issue, it is necessary to investigate it by proof before the propriety of the prior decree can be investigated. Decrees may be (1) by consent, (2) *ex parte* or (3) after contest, apparent or real and though each is liable to be attacked for fraud, the character of the fraud would vary with the circumstances of each case. One who seeks to impeach a decree passed after contest takes on himself a very heavy burden and it is not to be upset on a mere showing of fraud in the former suit. It is not to be upset on a mere showing of fraud where, and in what way, 1 Macq 535.

L. R. 751=37 A

motion and acting in order for the purpose of actually a fraud, must be fraud which and that mere irregularity, investigation of these rights is not the kind of fraud which will authorise the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled" *Per Lord Cairns L. J.* in *Patch v. Ward*, L. R. 3 Ch 203, see also *Cheo v. Johnston*, 2 Sch & Lef 308

In *Fowler v. Lloyd*, L. R. 10 Ch. 1 *Baggallay and Thesiger L. JJ.*, the suit was d

to have been sub
not question would
in the affirmative
action brought out
could be set aside
in to interrogatories,
of a process had
which the evidence
other wilfully and

corruptly perjured In this case, if the plaintiffs had sustained on this appeal the judgment in their favour the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury. as if the parties might go on after

proved that a
which judgment
These observations
Mohamed Go
"The principle
obtained by a fraud
from placing his case before the tribunal which was called upon to adjudicate

S. 44.

Both the defendants contended that the will was void, and that the probate was induced by fraud. *Held* that the second defendant was barred by the decision of the District Court in the revocation matter from raising the question in the Court of the Subordinate Judge. Further *held* that as regards

he does not raise these questions by his pleading, although he does so in the common cause with the second defendant in his defence. . . . As regards the second defendant, although he had a *locus standi* to make an application, his right is now at an end by reason of the unsuccessful result of his application for revocation. That being so, it appears to us that the first defendant has no defence to this suit.

The fact that the defendants have been in possession of the land in the village implies a decision in respect of any of the lands included in that village by a decree of Court under section 11 of Regulation III of 1872. It is open to the plaintiff to avoid the effect of such a decree. 2 A. or sub-section (1) of section 24 of the Evidence Act, 1872, is interested to bring forward in the Settlement Court, and to make to any part of such record.

the record. 19 C. L. J. 29; see also

Art. XIV of 1883 can only be used against whom an order

the fraudulent nature of the proceedings, the order passed upon it in any proceeding, the strength of that order. *Chumma v. Ram Das*.

16 Bom. L. R. 648.

Judgment vitiated by fraud, whether the same should be set aside. Whenever a party seeks to avail himself of a former judgment, fraudulently entered, the opposite-party may show the fraud, and thus avoid the judgment. *Whart. Ev. § 797*. Now the question is whether fraud can be collaterally set aside, or whether it can be directly set aside.

and cannot resort to a writ of *habeas corpus*. *Whart. Ev. §§ 797, 799*. So according to *Burr Jones* also "domestic law"

our attention to so

other words (confining

from a provision such as the plaintiffs contend it is intended to be merely

et on makes the same provision for
and that it does for avoiding a
Now there can be no question

Sib Saran v Rameshwar, 60 Ind Cas 640=1920 Pat 363=2 P L T 40,
Kunaram v Banomali, 29 Ind Cas 838 The case of *Ransilal v Ram Lal*

collateral proceeding." "In applying this rule it matters not whether the
impeached judge
Highest Court
every Court,

tes had fraudulently taken place under
in Ireland obtained by collusion between
person in whose favour a charge had

defendants through believing a false :
the plaintiff, nevertheless the defendan :

l to a foreign judgment
it obtained in an English
ught. There may be a

difference where it is sought to enforce by the process of a Court a judgment of
that very Court, because if that judgment has been obtained by improper means
the objection does not arise in a new action brought on that judgment, but it
arises with regard to the process of the Court to enforce a judgment of its own
In a case of that kind it was perhaps formerly necessary to proceed in a Court
of Equity in order to get rid of the judgment, but I doubt whether it was
necessary, because, at least in my opinion, a Court of Common Law would have
in the exercise of its own jurisdiction set aside a judgment procured from
it by deception "

In the case of *Vadala v Laurs*, L R 25 Q B D 310, in which an action
was brought by the plaintiff in the English Courts upon a judgment obtained
Bills of
Bills were
t without

in equally general language, is perfectly well settled, is that when you bring

Foreign judgment—how impeached under Indian law In India a foreign
judgment shall be conclusive as to any matter thereby directly adjudicated

law in force in
1908)

Collusion No definition of the word "collusion" is given in the Act.

may be of two kinds—(1) when the facts put forward as the foundation of
the judgment of the Court do not exist, (2) when they exist, but have been
corruptly preconcerted for the express purpose of obtaining the judgment."
Wharton Law Lexicon cited in Field Ev 7th Ed p 170 No doubt a decree
can be avoided on the ground of fraud or collusion under this section But

- S. 44.** there is a great : : : :
 made the victim of : : : :
 discovered the fr : : : :
 a point of defence : : : :
 collusion is a m : : : :
 is a point which could and might have been raised before the decree was p-
 on the last occasion. A third party can undoubtedly void a decree or
 ground that it has been obtained collusively, but it is clear that a party to
 collusive decree can not avoid it on that ground. *Sahib Rai v. Balan Lal*,
 I R (1927) All 494=101 Ind. Cas 765, *Chenar Appa v. Puttapu*, 11 B
Varadarajula v. Srinivasulu, 20 M. 333; *Kandetti v. Nukamma*, 31 M. 4,
 M. L. J 576; *Venkataramanna v. Viramma*, 10 M 17. That such a decree
 by the case of *Rangammal v. Feilsat*
 h, A. I R. 1927 All 523=101 Ind Cas
 rigage decree was made more than the
 absolute. After the decree absolute was
 judgment debtor transferred his equity
 judgment-debtors, though served with
 the annulment

questions and adduce evidence to prove the facts stated *Kama*
 18 C L. J 261

Who can plead fraud or collusion. The language of this section is
 enough to allow a party to the suit in which the judgment was obtained, to
 that it was obtained by the fraud of his antagonist, though the judgment
 to set up his own fra-
Indian Code Vol II
 h under the English
 such judgment is
 the suit in which it is
 non the Court

Aswani v. Banamali, 21 C W N. 591; *Taylor* § 1719; *Phip* Et Tit Ed.
 In England a party to a suit would not be allowed to defeat a judgment
 showing that it has procured an
Anglo Ind Code Vol II p 829 In :

, 27 C 11 (21-22)=
 st a judgment. *West v. Ash*
Ves Sen 244, *Ahmedbhoj v. Vullubhoj*, 6 B 763; *Prudham v. Phillips*, 2 A
 763 The rule that fraud can only be proved by an innocent party does
 apply, however to probate [*Birch v. B*, (1902) p 130], or divorce [*Doniphan*
B, (1892) 402] cases.

Party cannot plead his own collusion or fraud. Section 44 of the Indian
 Evidence Act, no doubt allows a judgment or decree, otherwise relevant, to be
 shown to have been obtained by fraud or collusion. But the whole
 doctrine that a party cannot plead his own collusion to avoid a decree
 supported by numero : : : :
 1179; *Bhaicabal v* : : : :
Nundo Lal, 26 C. 891
Srinivasulu, 20 M. 333 (338), *Kondetti v. Nukamma*, 31 M. 455 (457)=4 V L
 T. 331. A party cannot ask for relief against a fraudulent conveyance
 by him and which has been successfully used by him to defraud a creditor
Banku Behary v. Rajkumar, 4 C W N 289=27 C 231, *Gobari* 24
Ritu Roy, 23 C. 962; *Kali Charan v. Rasik Lal* 23 C 963 N. "The maxim
 par delicto potior est conditio possidentis is as thoroughly settled as any F
 tion of law can be. It is a maxim of law established, not for the first

it is made the antipony of his executor (ancestor ?) and *cessante ratione legis*

decree had been obtained by fraud
 fraud was their predecessor in title
 The principle that a party to

1151-22 C L J 197-29 Ind Cas 690

Suit to set aside judgment obtained
 section where a judgment has been obtained

decree, an *ex parte* decree or a decree passed after contest, is liable to be vacated on account of fraud *M A Maistry v Abdul Aziz*, 5 Rang 46-101 Ind Cas. 431-A. I R 1927 Rang 130, *Raman Menon v Madhava*, 98 Ind Cas 176-A I R 1927 Mad 96 To set aside a decree on the ground of fraud, it is not sufficient to prove constructive fraud, but an actual positive fraud, a mediated and intentional contrivance to keep the parties and the Court in ignorance of the real facts and obtaining a decree by that contrivance *Bishun Singh v*

P. L. T. 239 = (1920) Pat. 209 = 56 Ind. Cir. 615; *Nagendra v. Parbatty*, 20 C. W. N. 819, *Gendu v. Saddi*, 44 Ind. Cir. 983.

OPINIONS OF THIRD PERSON WHEN RELEVANT.

might be more accurate and sound than
mulation of law, a matter of no consequence.
in the most unequivocal manner, that the

It was for the jury to form opinions, and draw inferences and conclusions, and
y, or the Judge, the
the witness spoke
whether to believe
then the jury were
to judge of their import and their tendency The witness was not to say that he

centuries, and it was but slight before the present century In a sense, all
testimony to matter of fa
from phenomena and
Courts or in common lif

is not really to be called opinion evidence in the sense of the rule It has been
said, judiciously, that there is, in truth, no general rule requiring the rejection of
opinions as evidence' (*Hardy v Merrill*, 66 N. H. 227, 241). Without acceding

S. 45.

the case

Matters of opinion—meaning of. I phrase "matter of opinion" fails to represent a definite conception. As used in the law of evidence

shows
logical

as applies to the use of the reason

of opinion there relating to facts, is applied

whole or in large part, of an act of reasoning, but propositions of belief, not capable of verification religious views, political principles and the like, as to which certainty is practically impossible. These are the matters of endless debate of argument pure and simple. In cases of these debatable questions, the facts of the trial, *res gestae* or probative, are in no way involved. *Chamberlain v. E.* 1791, 1792

Why opinion evidence was a matter of testimony. In *Wright v. Tatham*

concede, though, it is not, opinion of a witness even on oath is, as such, admissible evidence without question of competency. When you can bring the decision of that question sometimes may, to depend upon deductions from scientific principles.

at the same time that this principle is becoming recognized, or as

there occurs a general recognition of what seemed at the time as an exception to it—the use of skilled witness *Wigmore* § 1917 ‘Though the witnesses can in general speak only as to facts, yet in questions of science persons versed in the subject may deliver their opinion upon oath on the case proved by other

on the subject in dispute” *Peake’s Evidence*, 143 Like other exclusionary rules in the law of evidence, that which undertakes to reject ‘opinion’ may be a
 rectly
 nent of
 is not
 The
 equate
 knowledge on the subject His declaration, therefore, is said to be rejected as
 opinion *Chamberlayne’s Ev* § 1793

person who had to be received by way of exception to that notion Thus, when an ordinary lay witness took the stand, equipped with personal acquaintance
 ge, the circum
 and expressed
 per It would
 not occur to any Judge that this witness was doing a wrong thing In short, it was only ‘opinion’ as a mere guess and a belief without observation which they
 3 Burr 1905, 1918 *Lord Mansfield* said “Mere
 opinion as an inference or conclusion from
 did not think of disparaging That this was the
 ver will appear from the following passages
 hich witnesses speak from judgment and opinion,

ich he witness may form *Mr Espinasse*
 he “*See it*” 5-7 (Am)
 when the early
 had in mind
 ncluded in his
 the case of the lay
 testimony an opinion or inference based on these data—as in the leading
 instances (used by those writers and Judges) of handwriting character, and

now and
 witness
 proposi-
 made at
 this opi
 before the jury and they were as competent as he to draw an inference It must
 ory,
 It
 r to
 be no English rulings which indicate that the opinion rule has there been
 I E. A.—91

S. 45.

bar Wigmore § 1917.

been
ground
giving
witness

nature It simply endeavours to save time
telling the witness: "The tribunal is on -
materials of information as yourself, thus, as you can add nothing
materials for judgment you if what testimony is unnecessary, and
encumbers the pro
applied in each
the principle" II
Mansfield in *Carier v Boehm*, 5 Burr. 1303, 1310. It is from which
rightly formed, could only be drawn from the same premises from which
Court and the jury were to determine the cause, and therefore it is improper
irrelevant in the mouth of a witness"

Opinion and fact, how to distinguish. Accurately to distinguish "matter
of fact" from "matter of opinion" is not less difficult than to distinguish
from "matter of law" In all supposed statements of fact the witness
testifies to the opinion formed by the tribunal upon the presentation of the
senses Statement of opinion is the
fact 1 *What Ev* § 15 An
"opinion" is found in cases where
inadvisable to permit a correct or effective impression to be
permitted to state simply the impression, such phenomena produced in
minds This apparently is simply another method of stating facts *Test. E.*
8th Ed p 473, *Corn v Sturtevant*, 117 Mass 122, 133 So also if we look
at the process of the mind for if a process of the mind is of the

sense this may be said to be a statement of opinion—that is, it is
the witness's mind upon a state of facts presented to his senses—and in the
in question there was sufficient doubt as to the nature of the statement to cause
the objection to be raised, yet the Court held, and quite properly, that it was
speaking the
Ct. Ry. Co
cases which
the witness
in several ways, and sometimes the use of one word will make a

could not even have been raised, had the witness used, instead of the word 'acknowledged' the word 'said'. *Haunler v Davis*, 128 Iowa 216=103 N W 573. A witness may not be asked whether there was any room in a car for other men, but may state whether there was any vacant or unoccupied space in the car. *Chicago Terminal Transfer Co v R. Co.*, 114 Ill. 407.

knowledge on the part of the witness testifying. What he thinks in respect to the existence or non existence of a fact in issue is matter of opinion, and he cannot state it. It is for him to put before the jury the facts as he has perceived them by his senses.

of the robbery they recognized him by his

The testimony was objected to as opinion.

The Court treats the question as follows. The statement by the witnesses for the prosecution of a fact which they ascertained through the sense of hearing was not the statement of mere matter of opinion, but the statement of a conclusion reached directly at

A witness can learn and

faculties—his five sense

Prof Wigmore no such

principle", says the lear

out of the question and considering only principle) that there is no virtue in any test based on the mere verbal or logical distinction between 'opinion' and 'fact'.

Further more, an examination of the so called opinion rule, as applied in its various instances shows that the opinion element is in the very law itself, a merely superficial and casual mark and not the essential feature" *Wigmore* § 1919

Entire Elimination of Inference Impossible The impression which first arises to the mind upon hearing the ideal position of the witness thus stated is a conviction of the impossibility for any one to satisfy such requirements

of the simplest fact

ative recognition of

ning Observation

by the aid of the

that of inference or

reasoning viz, intuition so instantly and intuitively that the mind is seldom conscious of the process. These sense-impressions are seized by the reasoning powers and the mind becomes aware of the concept rather than a mere percep-

when those original sense perceptions have become so overlaid by inference, experiment that the reaction of each upon the other can no longer be distinguished from the practically

Involution of Reasoning, (1) Inference While the entire elimination of inference is impossible, something may fairly be said as to the relation which observation and inference bear to each other in certain classes of mental result. However distinct the classes may be in broad outline they present the ordinary difficulties inherent where one class shades into another by almost imperceptible distinct line is frequently difficult to draw nor can it be

S. 45. approximate certainty as to how far the state of the case, or other similar considerations may influence a Court in making rulings even on a particular set of facts. It may be said that the fact of the case, or other similar considerations, which suggest the possibility of obnoxious results, divide the mind of the Court according to the proportion of these mental acts or processes. (2) Conclusion, and (3) Judgment.

Inference—In the first of these classes, that of Inference, the element of observation is at its maximum. The facts of the

Delivered by

19
bv

A reasoned inference on

red to the intuition
not instantly as
reasoning more of

were, of the mind. A theory, simple, perhaps; but still a theory. The mind is conscious of a distinct step, although, it may be, a short one. Chamberlain's
Ev § 1802

Input: 4

a neighborhood ^{under} such a definition ^{an inference} of backtracking

that reasoning is then seen to be based, in a greater or less degree, upon the existence of facts not verified and frequently unascertained - (A) *layne's Ev* § 1803.

result is styled a hypothesis. The
 raves is referred to his Judgment.
 Chamberlain's Ex \$ 1501.

Credibility of intuition The administrative reason for rejecting the S.

trustworth

operation

statements

ience shows that instinctively acting the normal human mind tends to observe correctly and report neous statement is reasoning is not

almost as a matter of course, one more reasoned in its nature can be admitted only upon the exhibition of some satisfactory administrative necessity for so doing For the reception of a conclusion a still more imperative necessity is required Inability to offer other evidence or to prove a case without using this species of proof culminates when a judgment is offered *Chamberlayne's Ev § 1808*

omenon observed by the witness
d to the tribunal wherever possible,

ties

by

nds

essential, in the second place, that the substituted evidence should be both objectively and subjectively relevant to the existence of some fact in the *res gestae*. *Chamberlayne's Ev § 1808*

Scope of the rule rejecting the opinion of witness "The opinions of any person, other than the Judge by whom the fact is to be decided, as to the exis-

"The opinion of a competent person is

case of 'hearsay', there is an
may be stated as follows (1

in the

the rule

express

ive an

doubt

45-50

person

is not allowed to express an opinion that a fact which is being enquired into exists (save and except in cases mentioned in 45-50), he is right in his statement of law But if his lordship meant that a fact-witness is debarred from stating his opinion in any case, when on the stand, his statement of law is evidently erroneous Observation and reason being practically inseparable, the real administrative problem is not as to whether reasoning shall be excluded in to to but rather in determining whether a particular involution of a given quantum of reasoning is necessary under the facts of a particular situation As facts become more complex, more compound, the proportion of reasoning almost of necessity, grows greater So intimate, in many cases, is the blending, that the

S. 45

Court is compelled to accept or reject the whole, despoiling of "nucleus" separation *Chamberlaynes Ex* § 1837 In this connection the observation of *Foster, C J* in *Hardy v. Merrill*, 56 N. H. 241, should be borne in mind "All evidence is opinion merely unless you choose to call it fact and knowledge as discovered by and manifested to the observation of it to me quite unnecessary admission of such evidence, or isolated and arbitrary) to of some books and the cl rule requiring the rejection o he and to exist, which is lost to sight in an enveloping mass of arbitrary ex- tions" *Wigmore* § 1919 The Hearsay rule rule are the product of in in E

while the Opinion rule will always

Proper scope of opinion
his opinion

inevitable (b) So also, if certain evidential material, having a probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, or by virtue of the personality of the witness tends to receive an effect there is good ground for excluding such evidence

such are objectionable—for a witness's knowledge and all knowledge is made up of inference,—but because the inference under the circumstances is

of in this
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essential
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ation
ions

ts from which n

be able to separate the facts and indications from which he has formed a conclusion from the conclusion itself *Yahn v Ottumwa*, 60 Iowa 429=15 N W 257 From the many illustrations given below it will appear that, from the often be received uses in that, from the described in such language we will enable persons not eye-witnesses to form one accurate judgment in regard to it *Burr Jones* § 360 The opinions of non experts are admissible, therefore, provided they state, so far as the opinions are based on questions of animals, or hand writing; and of the size, time and distances; of the mental state of and

or seemed hostile, intoxicated They can state as to who deduced or that a person appeared rational If person looked excit

matters more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinion from such facts, where such opinions involve conclusions material to the subject of inquiry In eu fu be re fr

Inference—condition of Admissibility—Necessity The necessity for a use of reasoning, more or less great, is practically insuperable. The simplest

45. Statement of a fact embodies an element of inference. In the original sense-impressions received from observations are brought to conscious-ness by faculty of intuition. The mind, however, seizes upon the material, with such instant avidity as to make the transition to the inference practically unrecognizable. The statement therefore of a observed phenomenon, classed as one of fact, is, in reality, a declaration what the observer inferred the fact to be. To this use of inference no substantive objection can be taken. Facts can be proved in no other way. It is therefore continuous thus to be stated. The necessity, however, for a larger element of inference, in a mental process somewhat more complex at once discernible. Not only may the witness be powerless to state a simple fact without stating his inference as to it. He may be able to state compound facts in the same way. True, it may be quite possible to declare certain of the component or constituent facts which go to make a compound fact in such a manner that it without the slightest difficulty.

facts. Still he may, in most cases, by reason of the clear statement of any adequate sole, was observed by Under such circumstances, judicial administration, ex necessitate rei, present

the result to which they have led his reasoning faculties.
Fr § 1810

in which it
of a person
evidence,
Fr § 1861

or mental states may serve, if the inference of the witness is necessary is a matter of opinion or belief, not cognizable and inadmissible

a stranger, and then
Expert and Opinion
the voice alone, and
the tones of voice in such a manner that from the description The testimony of the witness

on as to the
admissible to
143 Cal. 2d 1111

707. In many instances
the act of reasoning is
numerous and minute to

Chamberlayne's Ev § 1861. v. Frith, (1896) P. 74. Brooke v Brooke, 60 Md. 529, 533. The same well 142. for the

it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as that of that
cher, 117
 an expert
 f a thing,
 still there

is no rule of law, and there can be non
 know of property before he can be
 He must have some acquaintance with
 estimate of its value, and then it is for the jury to determine how much weight
 to attach to such estimate *Bedell v. Long Island R. Co*, 49 N. Y. 367; *Lawson*

be presumed to have a sufficient knowledge of the market value of property
 from the location and character of the land in question *Pennsylvania, etc.*
R. Co. v Bunnell, 81 Pa St 426 The best and only legitimate evidence of the
 value of the land at the time of the sale would be the opinion of witnesses who had

founded *Illinois etc. Ry Co v Von Horn*, 18 Ill 257; *Durr Jones* § 363 So
 it is clear that the valuation of land must be arrived at by the tribunal by taking
 As regards
 urt. *Stucell*
ates, 2 Story,
 421 (Am); *Lawson's Exp & Op. Ev* pp 463 501, *Wigmore* §§ 1910 1911,
Narain Chandra v Cohen, 13 C 56; but see *Durarka v Lular*, 4 O C, 217
 As to how valuation is to be made under the Municipal and Land Acqui-
 sition Act *vide Manindra v Secretary of State*, 41 C 967; *Harish v Secre-*
tary of State, 11 C W N 875; *Wenrick v Secretary of State*, 13 C W
 N. 1059; *Secretary of State v Shanmugaraya*, 16 M 369; *Government of*
Bombay v. Meruany, 10 Bom L R 920, *Heyham v Bholanath*, 11 B L
 R 236; *Secretary of State v Belchambers* 33 C 103; *Tulsi v Secretary*
of State, 14 C W N. lxxx, *Jani Sahoy Sha v Secretary of State*, 8 C
 W N 671, *In Fsafah Salebhar*, 10 Bom L R 997, *kailash v Secretary*, 17
 C L J. 31

S. 44. **Sanity.** The reason for admission of non expert opinion evidence regards sanity
N. H 144: "by witnesses a
The opinion
no description
ordinarily he cannot give an adequate description of them"

80 (Am); Wigmore § 1934 "To ask
appeared peculiarly or strangely was s
opinion she was insane" *Per Doe J*
opinion of non-professional witness
such opinions are based upon their
person's appearance *Burr Jones* § 36

disease in any one *Tr. ch v Mc Daniel* 4 Fred 1 455 (Am.)
expert witness
person is sick
upon the nature
system of a p
days, however.

upon for their opinion as to sanity or insanity of the testator.
Caughman, 26 S E R 16 (S C); *Wheeler v. Alderson*, 3 How Eccl 371 6
606, *Dew v. Clerk*, 3 Add Eccl 79; *Eagleton v Kingston*, 3 Ves J 43
Hadfield's Case, 27 How St Tr 1281; *Lowe v Jolliffe*, 1 W Bl 365, *Tatham*
Wigmore § 1934

might have as to the bearing of the opinion rule *Wigmore* § 1935
as to sanity and opinion as to general testamentary or criminal capacity ar
entirely distinct The latter sort of opinion is inadmissible (when it is) beca
a question of law may be involved, and witnesses' conclusions, are not neede
on such points. *Wigmore* § 1937

Opinion from necessity The opinions of ordinary witnesses derived from
observation are amissible in evidence when, from the nature of the subject
the facts can be

This rule, however, has its exceptions, some of which are as
settled as the rule itself When all the pertinent facts can be
detailed and described, and when the triers are supposed to be able to

correct conclusions without the aid of exception to the rule is allowed. But case

: .S.

to deceive purchasers *Macdonald v Holland*, 10 S L R 175-41 Ind Cas. 539;
Suadishi Mills v. Juggi Lal, 24 A L J 975.

45. When the Court has to form an opinion upon a point

Opinions of experts of foreign law, or of science, or art, or as to identity of handwriting *[or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] *[or finger impressions] are relevant facts

Such persons are called experts.

Illustrations

(a) The question is, whether the death of A was caused by poison

The opinion of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant

by
mir
the
relevant

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant

knowledge of the facts, and, in the final outcome, withdrew from their consideration any facts of which they had original knowledge, confining them to such facts only as should be presented to them at the trial. This left to the jury simply the duty of drawing conclusions from facts presented. In many cases it was impossible to present to the minds of the jury, who were supposed to have no

v *Chadd*, (1762) 1 Doug 157, was a case in which an engineer was called in

*The words "or finger impressions" in both places where they occur in s. 45, were added by the Indian Evidence Act, 1897 (5 of 1897). For discussion in Council as to whether "finger impressions" include "thumb impressions", see Gazette of 1898, Pt. VI p 24

†These words in s. 45 were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s. 1.

- S. 45. show the effect of an embankment upon the filling up of a harbour. Lord Mansfield says: "Mr. Smcaton (the witness) understands the construction, of harbours, the cause of their construction, and how remedied. In matters of *Thornton v. Assurance Co. (1794)* Peck Champ. 116. In such a case often just The furnishing of such assistance to the

Principle. An expert i. e. a person having special skill in a matter which is more than the jury to draw is

nces on the subject. A skilled observer, administration is from all times imposes re

for the proof of his case to actually tendered is relevant for the purpose. His proper work is to reason. Tal by them, it is they indicate.

that his reasoning has a tendency to supplant that of the jury. In instances when administration permits an invasion of the province of the jury, an adequate forensic necessity must be shown for receiving the testimony of an expert. The administrative warrant differs, however, widely from that presented in case of the observer, whether ordinary or skilled. Where one is using sense-perception, the forensic necessity for admitting the evidence of an inference or conclusion most frequently in this, that the original

is ad by the witness as fully to be placed before is allowed, after stating such constan- case and those previously detailed into the case

In case of the expert, however, the inadequacy which the witness is to supply reason. No man can satisfactorily of art, science or the necessary data both be unknown

could properly draw for themselves. *Chamberlayne v. The King*

When Opinion evidence of expert is admissible. The principle underlying this section is clear enough, but in to be inconsistent results. All must decide the question on a case

more accuracy than the jurymen themselves. It is the nature of the subject matter

if practical everyday matter that the example, is put before the jury to give year was a proper time to set fire to the stable for horses, whether a fight is a prize fight, or whether the keeping of cows in connection with a hotel is unprofitable, the Court is presented with the question whether, because some

which permits of opinion testimony being given *McKelvey's Ev* § 134. In *Ferguson v Hubbell*, 97 N. Y. 507, 513-49 Am. Rep 544, the rule in regard to the admission of expert testimony is thus well stated by *Earl J* "It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of enquiry, and may better comprehend and appreciate it, than the jury, but to warrant its introduction, the subject of the enquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses, and yet parties nature to them, to resort to expert or opinion evidence." "The opinions of experts are, in general, admissible whenever the subject is one, & knowledge of which can only be acquired by special training or experience. When however, it is one upon

his view is to prevail. *The Beryl*, 9 F. D. 137, *The Gannet*, (1900) A. C. 231, 237, *The Australia v The Nautilus*, (1927) A. C. 145

- S. 45. questions of science, skill, trade, and others of the like kind." *Best Practice of Evidence* § 346. The rule on the subject is stated by Mr. Smith in *h. v. Carter v. B.* appears to be is admissible, persons are without such assistance; in other words, when it so far partakes of the nature of science, as to require a course of previous habit, or study, in order to the attainment of a knowledge of it. See *Folkes v. Chadd*, 3 Doug. 157; *R. v. S.* 2 M. & M. 75; *Thornton v. R. E. Assur. Co*, Peaks 25; *Chaurand v. Angers* 44. While on the other hand, it does not seem to be contended that the opinion of the witness, the nature

the fact that the witness, though a practising physician, was held to be an expert, *2 Q. B. 766*; *Tullis v. Hall* 11 Ala. 648 (Am.); *Greenl. Ev.* § 440. "The term expert seems to imply superior knowledge and practical experience in the art or profession; but generally nothing more is required to entitle one to give testimony as an expert."

Shelluson, 8 C. B. 819; *Re. Whitelegs*, (1899) P. 257; *Halsbury* v. 41 p. 481.

witness must have special knowledge of the facts concerning which he is called upon to give evidence.

existence of facts capable of being proved or disproved by evidence. But this general rule has been broken in upon by the admission of various classes of exceptions, all of which are upon the common grounds of necessity. Such necessity is allowed to exist when the facts in issue are not themselves accessible by evidence, but are future probabilities or mere contingencies, - or else actual facts but not

positive knowledge. All of these must, of necessity, be judged of only from their proved facts known generally to accompany or to indicate these in question, as, for instance, where the facts to be ascertained are inferred from some rule of art or science, or observed law of nature thus proved; the knowledge by which they may not fall professional or science relating

is frequently a question such as dealers in that article can alone decide. There is a matter of necessity to call in the experienced or instructed opinion of a ship after a storm of those necessities. Thus, also, in *Acabit, 1 Car. & P.* landmen to draw any inference, and experienced of that kind amount to unjustifiable

are not admissible as such, but facts having been proved, men skilled in such or the likelihood of their. Indeed, it would be more en, professional or expert,

His scientific opinion is, in fact, his testimony to a law of nature. All these are testimonies to general facts which the jury can ascertain in no other way, and

in words the minute and transient facts observed by the witnesses from the r in his

one not which which Op Ev therefore must be necessary in second sary to 42 (Am);

Burr Jones § 369.

made a study of the subject. On the other hand, he may be an expert although his knowledge has been derived from the study of the subject, and not from actual experience or practice in the business or profession. Thus, it has sometimes been held that a physician may give opinions as to matters connected with his profession or with medical science, although in its own practice he may not have had experience as to such matters, and his knowledge in respect thereto is derived from study only, even though he may not have made the disease under

S. 45.

subject, he may be competent as an expert although engaged in some occupation, (*Detroit v. Van Steinbury*, 17 Mich. 99), or even if he has abandoned the business to which the enquiry relates. *Bearss v. Copley*, 10 N. Y. 43. It is necessary that the witness should possess the requisite skill that is actual study, experience or observation. The mere opportunity of obtaining such skill does not suffice. It must be shown that he is skilled or scientific, at least that he has superior actual skill or knowledge in relation to the question to that possessed by ordinary witnesses or observers. *Page v. Parker*, 40 H. L. 47. To prove or disprove infringement of trade mark evidence of men in the trade is not admissible to show whether or not a combination is such as would deceive a purchaser.

41 Ind. Cas. 539;

Lal, 49 A. 92-2

is true "he must, in

the immediate line

differentia of the few experts could be admitted to testify, certainly no Courts could be capable of determining whether such experts were competent. A general

the specialty belongs would seem to be Ala. 212. The value of the testimony is the experience or study of the witness.

Wells v. Leek, 151 Pa. 431; *Burr Jones* § 368. So "the first question that arises when we are dealing with an important witness who has made observations and inferences is this: 'How intelligent is he and what use does he make of his

attention for the Court"

himself may be

subject under en

may be called

give their opinions thereon. *Alumun v. ...* as to his own

But the expert cannot give his own opinion as to his own

Broadman v. Woodman, 47 N. H. 120; *Brahm v. State*, 113 Ala. 23. It

of the qualification of the witness

to the Court

the Court

In India this practice does not obtain. In the examination

otherwise his testimony will be examined

is purpose he should be examined

But it seems that he cannot give his

opinion as regards his own qualification. No exact standard by which

determine the competency of the witness exists, and much is necessarily

to the discretion of the trial Court. *Forgey v. First National Bank*, 101 Ind.

Courts that the

"Wh

tion,

the value of his testimony, and not to the Court

his testimony." *Reg Exp Test* 50. The right to a full cross-examination is thus secured; and if, it turns out the witness is not qualified, the Court should
 S. mination
 witness,
Burr Jones
 § 569.

Mode of examination of experts—Hypothetical questions It may be plainly inferred from what has already been stated that the testimony of those found qualified as experts is not confined to facts within their own personal knowledge, but that they may give their opinions upon an assumed state of facts, indeed, it is probably true that in the majority of cases in which experts are examined the facts assumed
Vide, Raghunath, 15 C 589 WL form of the hypothetical question in such cases, it is clear that the question should be so framed as to fairly and clearly present the state of facts which the counsel claims to be proved, and which the testimony on his part tends to prove. *Cowley v. People*, 83 as regards fact
v. Bell, 1 C If the other side

examination being within is fairly and reasonably con other words, the hypothet

would be defeated

Peerage, Le Marchant, 3d 379 The facts must on, 69 Mich 400 Where

is of course no basis for the superstructure *Burr Jones* § 371, *Whart* §§ 441, 451, 452

In *Lord Melville's Trial*, 29 How St. Tr 1065, *Lord Erskine L C* said "If you take away the foundation upon which it is made, which is matter for the Court afterwards, there is an end to the superstructure All that the witness has

S. 45.

although the facts assumed by counsel to be true are not proved, or although the question does not state the facts as they actually exist. The facts are generally in dispute, and it is sufficient if the question fairly states such facts as the proof of the examiner, fairly tends to establish, and fairly presents his claim of theory. *Burr Jones* § 371. Although on questions of professional skill he can state in a general form what could be the proper cause to pursue under the circumstances proved (*Sills v. Brown*, 9 C & P 601, 603, *Chapman v. Watson* 10 Bing 57; *Rich v. Pierpoint*, 3 F & E 35; *Collier v. Simpson*, 5 C & P 16). He may not be asked what his own conduct would have been under the circumstances (*Berthon v. Loughman*, 2 Stark. 258, *Hatch v. Lewis*, 2 F & F 457, 458, *Ramadge v. Ryan*, 9 Bing 333) *Phil Ev 7th Ed* 380

Protection

the jury, it is the existence of a fact which is controverted upon the evidence. His judgment is not to be invoked which of the two sets of witnesses is the more credible or regarding the relative probability of antagonistic stories told by the witnesses. The question is raised by the evidence.

science or skill merely in the case, (b) Where the issue is substantially one of

culpy, but not en bloc, the correct course is to put such facts to him hypothetically, asking him to assume one or more of them to be true, and to state his opinion thereon. Where, however, the facts are not in dispute, it has been said that the former question may be put as a matter of course, although not as of right. *Phil Ev 7th Ed* p 380

Form of questions. Policy as well as principle, require the form of the question to be expressly hypothetical, because otherwise the jury, and perhaps the witness, may be misled by the statement as to proved or admitted facts, of that which is in question.

considered, and the form of the question was very much considered. (Vol) 512, the form of the question was very much considered. You have to be satisfied that the facts stated by her witnesses, are true, what is the prisoner's mind, at the time of the time of the alleged crime? Was the prisoner in your opinion, at the time, and what kind of insanity or delusion, or conduct of a person under such circumstances, adopted the following form. "If the symptoms and manner of

testified to by other witnesses are proved and if the jury are satisfied of the truth of them, whether in their opinion, the party was insane and what was the nature and character of that insanity, what state of mind did they indicate;

S.

and at the same time to exclude their opinion as to the effect of the evidence in

ze as an expert (3)

, or where inferences

of facts must be drawn from the evidence, in order to be reasonably certain of the grounds on which an opinion is based, it is usually necessary that the facts should be stated hyp

rule for all cases,

presiding at the trial

or it will be held

in a hypothetical question may be very numerous, it sometimes happens that

to answer a question which confessedly rest upon no sound basis of fact Substance rather than form is the important consideration with a sound judicial

of its

he jury

It is

not deemed objectionable that the proponent uses the actual names as developed in the evidence in connection with his question to the expert Argumentative questions, that is those which involve a favourable argument which is assumed to be true, may properly be rejected *Chamberlayne's Et* §§ 2489-2494

is the cross-examination of an

test his memory, observation,

stand as a skilled witness,

his judgment upon germane matters may be tested by using premises and asking his conclusions *Higmore* § 684 The fact that the expert was not in a fit state of mind or health to form a proper opinion, or is interested, or corrupt

be elicited in cross

v *Royal Exchange*

(139) *Phy Ev* 7th

witness's opinion

unless the passages to be used are put in cross-examination to the witness, for him to explain them if he can 46 Ind Cts 393-22 C W N 745

and

ment

that

not testify that he saw a certain person at a certain time and that he was then

S. 45. labouring under an epileptic fit or stricken down and rendered unconscious. *Fetter, 25 Ia 75, per Dillon C J; & I. R. Co v. Bailey, 11 Oh St 3*.
 the witness had been a stranger to the actual facts, it would then have been necessary to assume a state of facts as the foundation of any opinion he might give; but no such assumption, it seems to us, is necessary when the witness is properly presumed to be himself personally acquainted with the material facts of the case. If an expert may give his opinion on facts testified to by him, he may also give his opinion on facts testified to by others, and it is not necessary that the fact be proved by cross-examination.

and by testimony *alunde*" *Ibid* **

An expert is called to give his opinion on a matter, and the parties to the case call him to give the scientific opinion which he expresses, not the party by which such opinion is tendered. *Lila Singh v Bejoy Protap, 41 C L J 300-87 Ind Cas 1, A I R 1925 Cal 768*.

Value of experts "Experts are the most important auxiliaries of the investigating officer, in some way or other nearly always are the main factor in deciding a case. But everything depends upon knowing how to make a question."

But it is also true that the expert is not to be called to give his opinion on a matter which he does not know, or on a matter which he is not qualified to give his opinion on. The expert is to be called to give his opinion on a matter which he is qualified to give his opinion on, and on a matter which he knows.

moment for putting his question i.e the moment when he is in possession of sufficient material to render his opinion.

"Every Investigator of problems, seeming to require the aid of experts in physical, chemical, or other matters, should be careful to put his question at the right moment, and to put it in a way which will elicit the answer he needs."

encouraging feature of judicial enquiries in the present day is the increasing appreciation of the application of science to proof. *Ibid p 331*

the Code as best as it can and it should not rely on the outside opinion of an eminent, as to the interpretation of that Code. *Ibid* But in England the law cannot be proved by production of a matter of fact. *Mastyn v Moor P. C. 481 In England*.

here the evidence is competent, 10 Moo P. 1 New York, 96 L. J. K. 1. not by mere certificates admissible, for being in authority. *McCormack* (1891) 1 Q. B. 509; *Westlake v Westlake*, (1910) P. 167; *Re Arton*, (1896) 1 Q. B. 509; *Walter v Barter*, (1907) P. 333. Another reason for this is that the law is continually liable to change. *Phry v 3rd Ed 342*. So foreign law is to be proved by expert testimony. The main controversy is whether a witness to foreign law must be by profession an advocate, attorney or Judge or whether a layman, if he claims knowledge may be trusted to speak as to the state of the law. The earlier practice in England seems to have been very liberal. *Vide Sussex Peerage Case*, 11 Cl & F 117-134; *Venderdunck v Theilussou*, 8 C. II 12, 824; *R v Dent*, 1 C. & K. 97. But in *Richardson v Anderson*, 1 Camp. 6, *Lord Ellenborough* insisted on the necessity of a professional character in the witness, see also *L. B. 359*; *Brad*, 10 C. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852,

marriage law *R v Savani*, 10 East 281 But a mere tradesman in a foreign country can prove the law of that country *R v Brampton*, 10 East 287, 2 v. *Naguib*, (1917) 1 K B 359 C C A A person to become competent to expected to know the law from 11 Foreign law on particular *idha*, A. I R 1926 M 218 A *Ibrahim* 47 A 823 80 Ind 690 So also his opinion of Hindu Law is admissible *Nara Sinha v Janigana*, 29 M 437

of an individual (*Church v Hubbard*, 2 Cranch 237) The usual mode of authenticating foreign laws (as it is of authenticating foreign judgments), is by an exemplification of a copy, under the Great Seal of the State, or by a copy proved to be a true copy, by a witness who has examined and compared it with the original, or by the certificate of an officer properly authorized by law to give the copy.

S. 45. App pp. 115—141, *Brush v. Wilkins*, 4 Johns Ch 520 *Mason v. F. Cowp* 174 Sometimes, however, certificate of persons in high authority has been allowed as evidence, without other proof" *Story on Conf of Law* 647; *Greenl Ev* § 486; *In re Dormoy*, 3 Hagg Eccl 767; *R v P. Howell's State Tr.* 515—673 When foreign law is allowed to be proved by experts, he is allowed to refer to accredited authorities on the subject of refreshing memory. *Nelson v Lord*, 8 Berr 527

As regards proof of foreign law, *Vide Gangadhar v. Sircar*, 11 B. Cas 112 = A. I. R. 1926 Mad. 218.

systematized, and has obtained method, relations and the forms of law *Davis J in Atchison & Co v U. S.*, 15 Ct Cl. 140 Expert testimony is usually thought of in connection with enquiry as to technical or scientific questions—questions requiring, as an essential to sound judgment, a special training of the mind—and this is the field in which the usefulness of such testimony is most often felt. The parts of human body, and the condition and operation of any of its functions, have been a fruitful field for this class of testimony *Young v. M.* 103 Mass 50, *McKelvey v. F.* 8 122 So on questions of science or art relating to some art may give their opinions to cause death, the *J. L.* of the *sible*

testimony called for from medical and surgical practitioners, and details of the various branches, upon which such evidence has been called and received, will disclose only portion of the area covered by the number of cases which increases with every discovery in either medicine or surgery. The opinions of physicians and surgeons may be admitted to show the physical condition of a person, the nature of the disease, whether temporary or permanent, the effect of disease or physical injuries upon the body or mind, as to in what manner or by what kind of instrument they were made, or at what wounds or injuries of a given character might have been inflicted, which would probably be fatal or actually did produce death, the cause, *symp*

a physician how certain wounds or injuries were actually given, what *harm*

ment or medicines (*Matteson v. New York C. S. Co.*, 30 N. Y. 22) What is the proper treatment under a given state of facts (*Wright v. Hardy*, 22 W. 111) the probabilities of recovery from the effects of an injury (*Hall v. Watts* (Pa.), 227); what, under certain circumstances, *is real or feigned* *March, R. D.* *Hayden*, 51 Vt. 296), and whether or not great mental anxiety and would tend to develop insanity, where there is an hereditary predisposition (*Dearnette v. Commonwealth*, 75 Va. 867) Upon the question of *the*

medical practitioner testifying in mental cases, there is a diversity of decision, American Courts, the preponderance of authority being in favour of accepting

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nce with the subject may always be inquired into to enable the jury to estimate

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the causes, nature and effects of disease among animals *State v. Sheets*, 89

O 543 As a preliminary question as to his qualification as an expert, a medical witness may be asked whether the examination made by him was careful

ate whether the injuries he is speaking of amount to grievous hurt or not, but ifly to describe the nature of the injuries *Empress v Bulwant*, A W N 1885,

medical man that has not seen the corpse, can give only expert evidence

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noticed by him

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erson is in 1881

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medical

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nd to whom extracts might be put *Shea Bahadur v Beni Bahadur*, 6 O L J 78-51 Ind Cas 419

Testimony of physicians and others as to poisons Toxicology is regarded as some jurisdiction as part of scientific knowledge of physicians, and to a certain extent this is justified by the course of education of medical men Thus

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equisite knowledge of chemical science Although it is usual for experts to subject compounds to a chemical analysis before testifying whether they are poisonous, or as to their ingredients, and although this has sometimes been held indispensable, the better rule is that the opinion may be received, although his test has been omitted, it being a matter which affects the weight rather than the competency of the testimony *State v Slagle*, 83 N C 630, *Burroughs* § 379.

Mechanics and machinists as experts When a witness shows himself expert in any particular art or craft, to admit of an examination properly addressed to persons of skill in that department of industry, he is competent to give an opinion upon matters of which the jury could not be expected to judge accurately from the mere detail of facts *Cole v Clark* 3 Wis. 323 Hence it is that the opinions of machinists and artisans may be received as
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coming to
opinions are

S. 45.

(*James v Hods*
value of labour,
Cook, 69 III 531
v Naglee, 17 Cal
such work (*Shut*
such manner a
(U S) 167), or
by certain mach
certain force of n
certain mode of
machine itself w

Experts on agriculture As illustrations of the same principle the op
of those skilled in farming and agriculture have received as to the pr
mode of
probable
stances,
probable
as to value, age, and weight of domestic animals and as to the us
proper management of stock Milk experts are competent to testify wh
certain liquid exhibited to them looked and tasted like milk and water
Burr Jones § 382

Insurers and insurance The opinions of persons specially skilled th
are admissible on questions
Expert & Op Ev 31, *Thornto*
Beckwith v Sydebotham 1
admitting the evidence and
say whether, upon such and such symptoms a person whose
could at the time of the insurance have been in good state of health
can testify as to the average duration of life with respect to the value of
annuities *Rouley v London*, L R 8 Ex 221

admissible —

Turn

Knight, 43 Me 27

"*Book-keepers*—As to the meaning of an entry in a bank book mar
difficult to decipher *Knox v Savings Bank*, 93 Mich 19

"*Botanists*—As to whether the working of coke ovens near a park
the trees in the neighbourhood *Salvin v Coal Co*, L R 9 Ch App 120

"*Chemists*—As to the effect of a particular poison *Harting v Pa*
Park, 319

"*Engineers Civil*—*Eggers v Huges*, 37 Pac. R 1037

"*Engineers, Electrical*—As to the imperfections of contrivances by
which, 57 N L J—
each link was

Hap v M 176

of the 171

rail road was finished there

in question

or quantity exists on the
"Inventors—As to the value of the case of certain inventions
stock cars *Burton v Burton Stock Car Co*, 50 N E. R. 1029

"*Photographers*—As to the genuineness of a signature to a note
Larnes, 16 Gray 161

"Post office—Inspectors—As to whether a document is written in feigned S. 4
 or natural hand *K v. Cator*, 4 Esp 187, *Revel v. Braham*, 4 T R 497.

"Surveyors—*Grand Rapid S R Co v Chesboro*, 74 Mich, 766

"Veterinary Surgeons—That a horse has blind staggers *People v. Bain*,
 3 Mich 453" *Lawson Op & Exp Ev* pp 7—9

Handwriting The genuineness of hand-writing, including, under this

are, however, co

he law deems
 and that the gei

imples of the use of circumstantial evidence extrinsic to, outside of, a docu-

thought, habit, character, as these, tend to develop each from the other, in
 this order, as a result of mental action. In other words the tendency of
 mental, physical or metaphysical impulses to express themselves in phys-
 ical action is the basis on which rests the probative force of resemblance in
 as himself into his hand-writing. To
 Naturally, this can, as a general rule,
 formation of physical habits. Practi-

l as it were,
 trained eye
 cr. On this

the inference from resemblance is based

not have seen the person in question actually write. (*Chamberlaines Ev*
 §§ 2177—2179)

An opinion of
 disputed writing

English common

fully in *Doe v*

divided (*Lord Denman* and *Mr Justice Williams* favouring, and *Justices*
Coleridge and *Latteson* opposing) upon the question of admitting the testimony
 of an expert who had made in examination of admittedly genuine specimens
 on the first day of the trial, and was called to testify on the second, and
 at that time stated that he thought he had acquired a knowledge of the

S. 45.

handwriting in question sufficient to enable him to tell whether the particular specimen was genuine. The Judges, however recognize with unanimity the established English common law doctrine that comparison of hands by the jury or by witnesses will not be allowed upon specimens introduced for that purpose. For purposes of comparison it is held that only original specimens may be used, press copies will not do. *Lord Denman*, in this case, speaks thus of this class of evidence "On the question whether handwriting, looked at by the jury is genuine or forged, the cases appear to me to have justly exploded the notion that bare inspection by the most skilful person can form an opinion."

in point of reason in such evidence. "But where," says Mr W D F

with the immediate evidence, as is shown by the comparison of

mind may be supposed to have acquired from the previous perusal of the very writings or even from the casual inspection of a single act is received acted upon without objection" *Mr W. D. Frazer, Notes to Pothier, II, 113*. That note was written by the great Judge like *Lord Coke* the learned Judge said not to the formation of the law.

1900 Act. The general principle is that the evidence must be such as to

corresponded with him" *Wigmore § 1993*.

Objection based

an admitted specimen placed before him. Therefore, in such

by Lord Coleridge J. in *Doe v. Suckermore*, 5 A. & E. 706; "If the genuine additional as to be essential illy stated

of Lord Coleridge is based on the assumption that the first of these modes, as indicated by Prof Wymore is the only one which is proper and possible and

S. 45;

§ 2000 But the better way to avoid the second mode of evidencing genuineness, is proving it to the Judge. In *University of Illinois v Spalding*, 71 N H. 165, 51 Att. 731, *Rennick J* thus said: "The third objection—that to permit comparison with specimens not otherwise in evidence, and admitted for the purpose of comparison, would introduce collateral issues and confuse and distract the jury—is when applied to specimens neither admitted by the parties

undoubted evidence. This involves, indeed a marked departure from common law. It does away with the common-law limitation of comparison

exceptions *Wigmore* § 2000

Thus stood the law in Procedure Act of that year (17 of a disputed writing with any to be genuine, shall in civil such writings and the evidence of witnesses respecting the submitted to the Court and the jury as evidence of the genuineness of others

is later a section in precisely the Evidence Act, 1865 (23 & 24 Vic.)

ference between the rules governing and criminal cases no longer exist

Wills' Civ Ev p 233

Basis of expert testimony for proving handwriting "Miscellaneous are points of difference in the infinite variety of nature in which one man differs from another, there is nothing in which men differ more than in their handwriting and when a man comes forward and says, 'You believe that such a man is dead and gone; he is not; I am the man,' if I know the handwriting of the man supposed to be dead, the first thing I would do would be to say, 'sit down and write that I am a lawyer'"

handwriting of the defendant, and to compare it with that of Roger Tuckborne and with that of Arthur Orton" *Tuckborne Trial*

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most automatic succession of acts stimulated by these habits. Thus, a person's style of writing, in most details, becomes as fixed as the habit, and serves as a continuous inseparable mark of that one person. Moreover the imitation of the style of writing by another person becomes difficult, because the other person cannot by mere will-power reproduce in himself all the muscular combinations to this that modern apparatus, of details, characteristic of the imitator. (For a complete of handwriting, the reader is referred to the following masterly treatise *Albert S. Osborn, 'Questioned Documents'*).

"Thus the data of graphic science make it possible to assert almost the universality of the proposition. No two persons' handwritings are normally This proposition finger-prints and as such rship of docu-

investigating

as a standard to

termination of this skill must of
Courts as applied to the circum-
5. Various forms of test have
lute. In *Doe v. Suckermore*
ess must be convenient with the
of a Court of Justice to be
012. The following persons
iters of handwriting — (1) Post
1c 4th Ed p 556; last Ec §
246). (2) Bank clerks, and (3) Lithographers. A witness can also give opinion
as an expert if he has made a special study of the subject. *R v. Sillerlock,*

is charged with having forged a document purporting to have been executed
of the Act, if their
Empress v Tahir
been cross-examined
he had put a parti-
cular and weight to
ed by applying to it
ected Sarwar v,
a finger print expert

cross examination in open Court Pitam v Baboo Singh, A I R 1924 Nag 183
Court should be very chary in accepting an opinion of Finger Print Expert
when such
itself so

a document Ramlakhan v Dharamdeo, 37 Ind Cas 335=A I R, 1926
at 575 Under this section the opinion of an expert formed by comparison
the thumb impression of an accused taken in Court under Act XXXIII of
120, s 5 with his thumb impression on deeds is admissible in evidence.
Superintendent v Kiran Bala, 30 C W N 373=43 Cr L J 79=93 Ind Cas
1=A. I. R. 1926 Cal 531 It cannot be laid down as a rule of law that it is
unsafe to base a conviction on the uncorroborated testimony of a finger print
expert. The true rule seems to be one of caution, that is to say the Court must
not take the opinion of the expert for granted, but it must examine his evidence
in order to satisfy itself that there can be no mistake and the responsibility is

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is not objectionable Public Prosecutor v Kandasami, 50 M 462=98 Ind. Cas.
9=A. I R 1927 Mad 696

Principles of Judicial Proof p 123

Value of expert evidence generally
considered to be of slight value, since
unwittingly, biased in favour of the side
to regard harmless facts as confirmation of preconceived theories; moreover
ly be multiplied at will
ic. & G 116, 128 per Lord
v Ashton, L. R. 17 Eq 373.
deserving of notice is that
if veracious and
He combines
witness—truthful,

S. 45. false, dogmatic, opinion—
more bully this man
truth You can no

tenacity of opinion is his weakness I
give up his opinion = Richard Harris H

"It is known, for example," says Prof. Wigmore, "that the receipt of fees by experts tends to bias that kind of witness, as it would bias any and that in judicial trials incompetent persons who falsely pose as such can often be obtained for hire. It is known too, that the selection and use of expert witnesses by the parties, instead of their selection by the Judge, to create a partisan bias." *Wigmore's Principles of Judicial Proof* p. 534.

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ndness of the re
W. N. 465 In B.
v B, 42 L Jo 402, the Court accepted the evidence of a wife as to the pae
of a ten months child, inspite of the unanimous opinion of several la
A tribunal should not accept the mere untested opinion of experts in
ference to direct and positive testimony as to facts *Poynton v P*, 37 L
T 54; *Arthur v. Mc Methan*, (1895) A C 310, *Newton v. Ricketts*, 9 A. L. J
The evidence of a skilled witness, however eminent, as to what he thinks may
may not have taken place under a particular combination of circumstances

taken by his own side Besides it must be remembered that an expert
called by one simply and solely because it may be ascertained that he
views favourable to his interest. *Hari Singh v Lachmi Devi*, 3 Lah L
110-59 Ind Gas 220; *Boisagomoff v Nahapiet*, 29 O 32 Where the
called expert witnesses give no data in support of their opinions
opinions should be rejected *Purbhu v Secretary of State*, A. L. R 1891 L
364. An opinion of an expert witness not based on any well known
inexorable laws of nature cannot be taken as decisive especially where the
direct evidence opposed to it. *Mansel v Emperor*, 96 Ind. Cas. 641-27 L
J 977-A I R 1926 Lah 313 See also A. I R 1923 Pat. 563-161 Ind C
698 "I am convinced" says Prof. Wigmore "that the belief that such person
must be the best witness, is false, at least as a generalization. Students
have had such experience with expert witnesses, and most of us have
observed that they often give false evidence because they treat the matter
in terms of their own interest and are convinced that things must be
according to the principles of their trade. However the event shapes itself, it
inally implies their own apprehensions

Every witness must be produced at
trial, unless and until it is proved either to be actually impossible to produce
him or to be difficult to do so, that it is under the circumstances such as
as such as those to which

Gills v Emperor, 2 O W. N. 377-12 O. L. J. 497-63 Ind. Cas. 641-27 L
L J. 1232-A I R. 1926 Oudh 616. But it is not satisfactory to examine the
expert witness on commission and not in the presence of the accused. The
evidence of an expert has always to be carefully weighed but, when given

commission, its value is considerably reduced. *Nur Din v. Emperor*, 10 Lah. S. L. J. 235=108 Ind. Cas. 369=29 Cr. L. J. 377=A. I. R. 1928 Lah 533

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medical witness who
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In re K. Venkatar
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witness, that has

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case the

certificate by itself is not a
person who gave it as a wit
L. R. 893=47 B 74=A
Cr. L. J. 339. See also *Sa*
80. The certificate of a
in the form prescribed in th
His report on a case by
in evidence without proof of the truth of its contents : *Raghunath v. Aurseong*.
Municipality, 76 Ind. Cas 394

Deposition of Medical witness. Section 509 of the Criminal Procedure
Code lays down . . . (1) The deposition of a Civil Surgeon or other medical
witness, taken
taken on con
enquiry trial

is deposition" S. 509 does not
witness admissible at the trial

before the Court of Sessions it should be recorded by the Magistrate who is

even in the absence of the witness. 38 Ind Cas 761=19 Cr. L. J. 280

Report of chemical examiner. Any document purporting to be a report
under the hand of any Chemical Examiner or Assistant Chemical Examiner to
Government upon any matter or thing duly submitted to him for examination or
analysis and report in the course of any proceeding under this Code, may be
used as evidence in any enquiry; trial or other proceeding under this Code.
(s. 510 Cr. Pro. Code).

S. 45

The report of a chemical the signature of the Examiner App 112=15 W. R. 49; 2 We before the institution of proc in person 50 Ind Cas 26=20 Cr. L J 266 Chemical examiner's t does not require formal proof, but it must be tendered as evidence and such It can not for the first time be used in appeal 21 A L J 859=53 Cas 904, but see 98 Ind Cas 177=5 Bur L J. 100=A I R 1926 Rang Failure by prosecution to adduce evidence connecting the parcels with the blood stained clothes which reached the Chemical Examiner with

Cas 485=28 C. W N 561.

Report of experts The reports of experts are not legal evidence and are examined by parties in respect of 7=20 P. L R 125, 15 C. W N 728 Op t evidence 76 Ind Cas. 425=1 Rang Expert opinion given for the purposes of a previous suit is not evidence and its evidential value is very little 110 Ind Cas 810=A. I R 1 Lah 921

Palm impressions Palm impressions are akin to finger impressions expert evidence relating thereto should on the whole be admitted rather excluded, to be weighed by the Court and the jury for whatever it is worth *Emperor v Babu Lal* 52 B 223=29 Cr. L J 410=30 Bom L R 321=195 Cas 508=A. I R 1928 Bom 158

invol

exper

stated by the Supreme Court of Ohio in *Clark v State*, 13 Ohio. + "Medical testimony is of too much importance to be disregarded When de with caution, and without bias in favor speculation and favourite theory, it even intelligent juries from following on inconsistent and unsound principles and received with utmost caution, and, like the opinions of acquaintances, should be regarded as of little weight if not well reasons of facts that admit of no misconstructions, and supported by which the judgment of

Qualifications of a medical witness. If the judge be satisfied that witness is competent to give an inference helpful to the tribunal, it is essential that he should be able to produce a diploma to be engaged in practice or even to be in case of a specialist. The rule is the the witness, the the fact as to whether however must

ask

in murder, the defence was insanity, the judges were all of opinion, such

opinion on the very point which the jury were to decide, viz, whether, from other testimony given in the case, the act charged was, in his opinion an act of insanity. *Wright, R & Ry* 456, 1831, on the authority of which *Park B* owed a medical man, who had heard a trial for cutting and maiming, to be owed symptoms of insanity

it in *Mc Naughton*, 10 Cl & F 2 Russ Cr 2262 (h) See the words of the Judge's answers. In *T Mason*, 7 Cr A. R 67=76 J P 184=T. L. II 120 (1911) murder it was held that an expert who has not seen the body, but has heard its condition described by the witnesses in their evidence, may state his opinion that death was not self inflicted. *Roscoe Cr Ev* p 170, *Reg v Newton*, Shrewsbury Spring C Sess Pap 374; *Doe d Bambridge v on*, 1b 149, *Sills v Brown*, 11 C & P 455. "A reasonable principle" says *William Wills* such, shall be permitted to testify only

such matters of professional knowledge or experience as have come within to such proved, so that testing

itness should be. "Assuming an injury of such and such a kind to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted" *Rogham v Empress* 9 C 455 It is a settled question entitled to be laid by *Merway*, 10

an L. II 907 (913) For questions to be put to medical witness, vide *Acharian's Wills' Cr Ev* App II

The most legitimate, valuable and wonderful application of expert evidence on charge of poisoning where poison is extracted from corpse by means of chemical analysis *Best Ev* § 514

Medical Inferences—Probative weight Many considerations may, as a natural, affect the weight in evidence accorded to a witness's inference of a recently made inference which comes from the truth of the statements made to him by the patient or by others is regarded as inspiring, to a certain extent, merely the weight of his testimony, either a jury nor the trial judge is presumed to have such technical knowledge as may upon the improbability of

an examination can those reached by witness toward the way, e g that the witness is interested to support his present contention in other connections *Chamberlayne & El* § 2030

Medical I

In many instances This being so; they

it the round about way of stating that the
 corroboration or rebuttal. The illustrations
 for this purpose, *res inter alios acta* is
 evitable. *Nort Ev p 225* So this section embodies a general rule which
 is down that evidence of collateral facts cannot be received. *Vide Taylor Ev*
37. For purposes of corroboration, the proponent of the inference commonly
 makes use of the text book statements at the stage of examination in-chief
 stating by means of them usually takes place on cross examination. *Chamber*

opponent uses it to enhance and corroborate the force of what his expert says
 is right of a proponent, who has submitted an inference, conclusion or
 judgment of a skilled witness to corroborate within reasonable limits, its proba-
 tive effect by showing the sound nature of the reasoning upon which it is based
 seems unquestionable. *Ibid* § 2528. The authority of the text writer can not
 be used as proof that the statements contained in the work are true. The
 hearsay rule forbids the use of the declarations in their assertive capacity. At

is the same as that which it has on direct. In other words the statements contained

into employing in their probative capacity. This result the judge may attempt
 to reach by means
 they may use

by ss. 57 and 60
 filled an expert

that madness is often of an hereditary character, evidence tending to show that
 none of the defendant's ancestors or near relations had been insane, would be
 admissible in support of the negative proposition; and on a question of disputed
 paternity, after proving as a matter of science, that children are apt to inherit
 the features or general appearance of their parents, evidence will be received of
 personal resemblance between the party in question and his alleged father.

- S. 47. *Bagot v Bagot*, 1 L R Ir 308, *Tay Lv* (9th Ed) § 337. An expert witness himself paralysed in the arm and leg may support his opinion as to the effect of such paralysis by testifying to its effect on himself *Chicago R & N v Lambert*, 119 Ill 255 (Am)

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157

up of a harbour, and e

of the wall, proof that the embankments, had begun to be choked about the same time as the harbour question, was admitted, as such evidence served to elucidate the real question.

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47

Ab Smeaton's (the expert) opinion, but as to harbours in which there are embankments, we think it was improper, since *litum litu resolutum*."

47. When the Court has to form an opinion as to the person by whom any document was written

Opinion as to handwriting, when relevant

signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation—A person is said to be acquainted with the handwriting of another person when he has seen that person write or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents, purporting to be written by the person have been habitually submitted to him.

Illustrations.

The question is, whether a given letter is in the handwriting of a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file of B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither C nor D ever saw A write.

Principle

distinct kinds

the act of writing

act, secondly, evidence of the kind of handwriting, *the establishment*

mode, there is always an inference from the type to the person

of an inference. The difficulty has not been over the relevancy of the writing traits to show the authorship of writing but over the mode of eliciting them by circumstantial evidence, and that is by examining one or

cause when the specimens to be used are themselves before the jury, they may imine them to form an opinion as to the standard or type of writing, and the opinion of a person of ordinary experience only, based upon these specimens, being no better than that of the jury themselves, is not needed, and excluded by the opinion rule, and hence the only persons whose aid need be used in studying these standards are those who have some special experience in and above that of the jury. Thus, we see whether the person whose aid we skill not possessed by the jury."

"The rule as to the proof of handwriting, where the witness has not eument in question may be stated generally the party write on some former occasions and the transactions have taken place between to have been written or signed by supposition, the witness is supposed not so much of the manner in

specimens, but to the general character of the writing, which is impressed on is as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent. And we best acquire a

rainfully, but in his natural manner." Per Coleridge J. in *Doe v. Buckmore*, 5 A. & E. 703.

the latter is to be regarded as genuinely an instance of the type in question.

S. 47. How to evidence the type of specimens—is a different matter. the mode of proving it by testi- that he is acquainted with the typ situation the witness (1) must of writing with which the adequacy of this knowl- tness properly claim that opportunities of observation have been such as to give him a fair knowl- of the general type or character of the person's hand. *Wigmore § 693* ordinary methods of proving handwritings are (1) calling as a witness a person who wrote the document or saw it written, or who is qualified to express

hand. This section deals with opinion evidence of non expert witness to prove handwriting. A person is considered qualified to testify to handwriting when he has seen the person whose handwriting is in question (1) when (2) in the ordinary course of business, has become familiar with such person's handwriting through the receipt of communications purporting to be written by him, or (3) when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. *McKelvey's Cr § 145* This section lays down another real exception to the rule excluding hearsay evidence. The reason for the exception is that unless a signature or writing has been made in the presence of a witness who can afterwards identify it, the only possible proof of handwriting is opinion evidence, and opinion evidence of person specially qualified to testify. We have thus in proof of handwriting the same two classes of expert testimony which have been before referred to,—that which is based on observation and that which is based on special training, or education upon a particular branch. There is some difference of opinion in the authorities as to just how much familiarity from observation will suffice. The general rule has been once specially qualifies a person. *Varian, 54 N Y 395; Tait § 181*

21 Wend (N Y) 557

There should be some control of the mark is not legal, it is not & Ma 510; *Wigmore § 693*

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When he has seen the person write—*Ex visu Scriptoris*—A person is acquainted with the handwriting of another when he has seen that person write whether often or seldom, much or little, recently or long ago *Lauson Op & Exp Ev* Rule 47 In *De La Motte's Case*, which took place in 1871, Mr Justice Buller said to the jury "The counsel on the part of the prisoner has just objected that similitude of handwriting is no evidence They certainly are right in the argument, but the objection does not apply to this case Similitude of

body that has
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s, but that is
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which you have heard read; they have all been proved by persons who were

adnowledge they say they believe the letters and papers are of his handwriting That, gentlemen is the only evidence that can be given of handwriting; except it happens that there be a person who saw the prisoner actually write the papers" *Hensdy's Case*, 10 How St Tr 1341 In *Hoper v Ashley*, 15 Ala

rule that seeing the per
Wigmore § 694 *Garrells v*
William v Warrall, 8
Warren v. Anderson, 8 Sc

S. 47. write on any other occasion The Court admitted his evidence. *Garned Alexander*, 4 Esp 37 The question is whether a paper is in B hand C seen him write only once His opinion is admitted *Horne Toke's Case* 5 H St. Tr 71, *Wellman v Warrall*, 8 C & P 380; *Warren v Anderson*, 8 S & W 2d 101. A was sued on a note which he denied ever having signed To prove signature, B, who has seen A write but once, and then only to receive a sum of money which B had paid to him, that case the Court observed

called to prove the handwriting

large number of times Handwriting, like the countenance, form and gesture of a party, is recognized by some more readily than by other witnesses

more decisive and obvious peculiarities than the countenance, and ascertain whether the witness has seen him write, and he knows to be that of the party and to be his

he must, upon his oath, declare if the writing exhibited appears to him to be that of the same party The weight to be attached to such testimony depends upon the ordinary tests of knowledge, the capacity of the witness, his disposition to tell the truth, and the means that have been afforded to him whether from the intrinsic nature of the subject itself or the familiarity of the witness with it, to acquire the information he assumes to have The weight to be attached to the genuineness of the defendant's signature to the note was there properly admitted See also *Hartung v People*, 4 Park C C 319, *Doyle v People*, 11 Park C C 120, *Lawson Expt & Op Ex p* 336 *Mr. Elian v People*, 11 Park C C 120, *Lawson Expt & Op Ex p* 336 Mr. Elian v People, 11 Park C C 120, *Lawson Expt & Op Ex p* 336 I have known the admission of this evidence carried so far as for a witness after the failure of other attempts, to stand up and swear to a knowledge of the writing of the opposite party from having once looked over his shoulder when writing a letter

In *Powell v Ford*, 2 Stark, 161 where the witness had seen his name only once, on which occasion he did not write it at length, but the initial of his Christian name, Lord Ellenborough said that "if the witness had seen the defendant write a name of full length although but once it is

Christian name, and that it was as necessary to prove the Christian name as well as the surname to be in the defendant's handwriting, and that two letters was not to be inferred from the other, any more than the rest of the name could be inferred from proof that one or two letters were in his handwriting But ten years later, in *Leuts v Sapio*, M & M 39, Chief Justice Abbott ruled that a witness to be bound by this ruling In this case, to prove the defendant to be the writer of a letter, it was necessary to prove that he had seen him write

is the foundation

"When I first came

ton, 8 Ves. 421

Courts, was this

party write. If he is

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be his handwriting

to go to the jury If he refused to answer to his belief, he was not bound to do too much, to form a belief, but if he would not go to the length of doing

seen him
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ht go to the
ture of all
& L 793,

S.

Patteson Jⁿ said: "All evidence of handwriting, except where the witness sees
■ belief which a
an exemplar in
vledge may have

13 W. R 191

The question is whether a certain paper was written by T W, who has not
seen T write for nineteen years, is called, and his testimony is received *Horne*
Tooke's Case, 25 How St Tr 71, see also *Warren v Anderson*, 8 Scott 384,
where the witness has seen the writer to write ten years before. So in *Smith*
v. Walton, 8 Gill 18 (Am) a witness was allowed to depose after six years. In
that case the Court observes "The impression made on the mind of a witness
who has seen ■ party write his name only in a single instance may be exceed-
ingly faint and imperfect, but it is nevertheless testimony, provided the witness

more vivid and lasting impression from the examination of a single signature

—an assumption
is acquired after
comes important

S. 47. to testify as to the genuineness of a signature where his knowledge was of his purporting to be her wife, and to be a letter to her. The

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Thompson v

v Fry, 1 C

Bl 384; *Murcia v Wolphagen*, 2 C & K 744; *Southern Ex Co v El*
41 Miss 216, *Parsons v McDaniell*, 62 Gr. 100. *Lawson Exp & Op El*
The question was whether a document was in T's handwriting. B had re-
ceived no reply thereto. B was held not qualified to prove A's hand-
Webb v Manro Morris (Iowa) 411. "The witness in the present instance"
the Court in the above case "had received two letters purporting to come
the defendant, to one of which he had replied. Had the correspondence
had been so far rebutted."

to introduce knowledge of handwriting, not from actual inspection but
correspondence. I adhered to an expression in frequent use, and which
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the word act done the observation is without foundation
sort is necessary. Anything from which the identity of the writer is
may suffice." In *Cunningham v Hudson River Bank*, 21 Wend 559, but
that a person had re-

and that merely
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such a person
that the

The law in America on this point is thus stated: "as to letters purporting to be genuine, and in the handwriting of the person from whom they are supposed to come. A person who has heard business correspondence with such a person upon by both parties, is competent to testify as to the handwriting of the correspondent, although he may never have seen him write. But such testimony has no relation to business transactions, but are letters of merely private nature, and contents of the letters. The testimony of such a person is not admissible."

the part of the supposed writer, other than the fact that the letters are genuine, and in the handwriting of the person from whom they are supposed to come. A person who has heard business correspondence with such a person upon by both parties, is competent to testify as to the handwriting of the correspondent, although he may never have seen him write. But such testimony has no relation to business transactions, but are letters of merely private nature, and contents of the letters. The testimony of such a person is not admissible."

and contents of the letters. The testimony of such a person is not admissible."

fect that he had known the plaintiff for fourteen or fifteen years, did not know whether he had ever seen her write; corresponded with her about fourteen years ago, received about a dozen letters in answer to his own, with her name signed to them; had received no letters recently, had some of the letters with her. The question was then propounded to him: From your knowledge of her
 I you know
 to be asked,
 I did not know

1 W. Bl. 384, per Lord Mansfield; *Barnes v Trompowsky*, 7 T R 285 *Owenston v. Wilson*, 11 C & K 1; *Murcia v Wolfshagen*, 2 C & K 741; *Turner's Case*, 3 Cr App 103, 155 = (1910) 1 K B 346 In the last mentioned case a document of consent signed by the Director of Public Prosecutions was put in In
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 of K was clearly competent The witness testified that he had corresponded with the merchant in New York whose signature was to be proved, by writing to him, and receiving letters from him, and in this way he had acquired a knowledge of his signature The objection was, the witness had not shown himself qualified to speak of it It is within one of the above modes stated whereby the competent knowledge may be acquired, and the witness professed that in that way he had acquired his knowledge of his operations."

When in the ordinary course of business, documents purporting to be written etc—*Ex Scriptio Olim Visis* A person is acquainted with the hand writing of another when, in the ordinary course of business, writings purporting to be written by that person have passed through his hands *Berg v Peterson*, 49 Minn 420 (Am), *Pottle v Rainey*, 98 N C 513 (Am) "The clerk" as Lord Denman remarked in *Doe v Suckermore*, 5 Ad & El 703, "who con-

S. 47

by the supposed writer of the paper in question' In *Tidford v Knott*, (2 Jo¹ Cas 214) it was held that the signature of a person who had been in the habit of signing bank bills, and believed the signature to be his, was sufficient to make the plaintiff's notes, all of which, except one, were signed with his signature to them, untrue. If, then

the handwriting, being
right to have been a real
handwriting if he had

answered that question affirmatively, then the receipts should have been received in evidence" *Lauson Expt & Op. Ev p 343* Where the genuineness of signatures to bank bills is disputed, the evidence of bank officers, the hands of whose hands similar bills pass daily, is obviously of highest value.

not connected with the bank, but who have frequently received and cashed bills purporting to be issued by it, and who have cashed such bills at the bank are competent to testify to the signatures of the cashier and president on bills alleged to be forgeries. *Com v American Case*, "that no cashier and cashier of habit of receiving sound one been in the

to be acquainted
official position
is settled

he can testify by letter, although he has never seen him write as he has knowledge in one of the

of knowledge of the party's handwriting which enable him to give his opinion as to the genuineness he should be permitted to give to the jury his opinion as to the subject." *The case of the State of Ohio v. The Ohio & Erie Canal Co.* recorder in the office become *Geoming*

N. C. 112); a jailor through whose hands letters signed by a prisoner received from him to parties out side have passed, may, from this circumstance alone, form a sufficient knowledge of the prisoner's handwriting *State v. Hastings*, 53 N. H. 450; *Lawson Expt & Op Ev* 399 In order to prove the handwriting or signature of another person one must show that he is acquainted

Emperoi v Pande, 27 Bom L R 1031=89 Ind Cas 1042=26 Cr L J. 1474=
A. I. R 1923 Bom 429

N Y 393.

Signature of a Partnership firm A witness may be acquainted with the signature of a firm without being able to identify the handwriting of either or any partner *Gordon v Price*, 10 Ired 385 "It is of no consequence that the

the witness The substance

witness has drawn the inference that they were made by one and the same individual The strength of his belief will depend on the greater or less degree of similarity He can only testify to his own state of mind on this question. The

S. 47.

belief was properly before

he could not so understood by thereby to limit to say that the testimony of a p that he is of opinion, or that he thinks, the paper is genuine, yet, as a step further when the witness will only state that the handwriting is like a statement which may be perfectly true, but yet, within the knowledge of the witness, the paper might have been written by an utter stranger. *T. v. J.* § 1868

Knowledge of handwriting acquired for the purpose of testifying. Knowledge of handwriting, acquired for where it is clear that there was no motive to manufacture testimony. *Reese v. Ind 635 (Am); Lawson Expert & Op Ev Rule 54* The question at a trial was as to the handwriting of A B was offered as a witness. It appeared that previous to the trial, A had written his name for the purpose of showing B, his mark. *Esp 15* because, being common in writing letter, handwriting

since the controversy on the subject arose. To this general rule can be taken *Chamberlayne's Ev § 2198*; see also *R. v. Rickard*, 13 Cr R 140, *Stranger v. Seale*, 1 Esp 14; *Fitzwater Peetrage*, 10 C. & F 193, *Per Suchmore*, 6 A & E 703

proof
burden

insufficient to qualify him. *Henderson v. Bank of Montgomery*, 22 *Lauson Expert & Op Ev. rule 56* In proof of a document a witness who he was acquainted with the handwriting of the writer, but he was not a legal examination-in-chief any question which would elicit any of the several indicated in the explanation to section 47 of the Indian Evidence Act 1872. The witness was not cross-examined in the point, neither any other was. *Ham* the

as it stands. *Taylor § 1863* "It is a principle of the law in this country also, expedient that the matters referred to

the handwriting. *Per Jenkins C J in Santharao v. ...*

Therefore, where the witness has not been questioned on the trial as to his means of knowing a certain handwriting, no objection to the want of qualifications so to testify can be made on appeal. *Ibid*; *Berryman v Dahlgren*, 6 Rob 188, *Smith v Walton*, 8 Gill 81. So the evidence of a witness contained in a deposition that he knows a certain paper to be in the handwriting of a party is sufficient, on appeal, where the opposite party has declined to cross-examine as to his means of knowledge. *Huttner v Gould*, 8 Walls, 485. So where the

Ev 332.

nce The testimony of one witness to a sign the instrument, and whose credi-

the similarity and likeness to signatures of his which they have seen. Such

features or their expression remain as we have been accustomed to see them. We know the face, though derangement has imparted to it a new appearance, or when distorted by pain or disfigured by wounds and presented in an entire
 3 the memory The
 and trees, and to dis-
 general class We

daily meet those who, with
 precise kind of fruit it will bear
 although, if questioned, they
 between the several species. We judge of writings, as of other things, by its
 individual character as a whole. We must take the opinion of those witnesses
 altogether, and judge of their testimony as under all the circumstances they
 shall appear entitled to weight, from their opportunity of knowing the
 defendant's handwriting, and your estimate of their skill and judgment.
 A cashier of a bank is entitled to no more credit than any other person
 of equal skill." The jury found for the plaintiff. *Lawson, Exr & Op*
 Ev. 330.

S. 48. 48 When the Court has to form an opinion as to the existence of any general custom or right of opinion, as to the existence of such custom, when relevant or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression “general custom or right” includes customs or right common to any considerable class of persons.

Illustration

gation no better evidence can be obtained, or the facts cannot be presented to the tribunal *Lauson, Op & Expert* Lw Rule 63 frequently collective where a combination of the known elements may be pressed in the form of a conclusion or inference. Such inference is not

are, so to speak, the depositories of the customary law just as the depositories of the general law *Jag Mohan Das v Ma* 528 (543)

Scope of the section In *Bai D* ... said “Mere opinion evidence is custom must be proved by specific failed to adduce (*Rahmat Bai v Akbar Khan*, 1 A 441 But in a later ... a tribal or family custom excluding a daughter or sister from ... favour of a collateral may be proved by general evidence as to its existence members of the tribe or family who would naturally be cognizant of its existence and its operation. In such instances need

who would be likely to know of its existence, if it existed, are relevant, but such opinions must be given by witnesses who give evidence *Maung On v Maung Shus Bui* 1 L B R 80, *Hudray v Chandra* 1921 Oudh 89—S O W N 6 So the statements made by persons in a position to know of the existence of a custom or usage in the relevant admissible under this section *Sariatullah v Pran Nath*, 26 C 1 1

excluding daughters
papers, directed to be
usage of this kind of

under s 35 of the Evidence Act, though they had been prepared by the settlement S. 4

most important document contained in the official records relating to the village

of inheritance, or, under section 48 as the record of opinion is to the existence
it" So their Lordships think
who holds that opinion should
sed on hearsay Vide Per Lord

Dary in *Gurudhuaya v. Suparandhuaya*, 23 A 37-27 I A 238 *supra*. So
according to their Lordships
admissible in evidence
tion of the section can
construction of the words
lay down certain well
is admissible. But these sections are not in any way exceptions to section 60
of the Evidence Act, which lays down that if it refers to an opinion or to the
grounds on which that opinion is held it must be the evidence of the person

M L T. 1-5 A L J
and customs, public
in evidence Section
in cases in which the declarant cannot be brought before the Court, whether in
consequence of death or from other cause This section refers only to general

has personally known the right or custom exercised as a matter of fact Custom
is not a matter to be submitted to the senses It is made up of an aggregated
repetition of the same though a
bare opinion is worth data on
which it is founded; to be

the limits of a village or of
exclusion of others, a right
roads, or plant trees, rights
of common and the like, will
Not Ex 227

Customs A custom is a particular rule which had existed either actually
obtained the force of law in
not consistent with the general
od, 6 Q B 50, *Halsbury Vol X*
finite limited locality It may
prior, 4 Burr. 2305 For further
annotations, vide p 211 *supra*

S. 49.

Right "It may be difficult, perhaps to define precisely the scope of the word 'right' but I think it was here intended to include those properties of an incorporeal nature, which in legal phraseology are generally called rights."

6 C 171 (F B) at p 185 In the same case *Jackson J* said "It seems to

a very wide interpretation to the has been said that, in section 13 of refer to incorporeal rights only, in ss 32 and 48, where the same word occurs in conjunction with the 'custom' it has been used in that sense. In the first place, it is by no means clear that it is to conceive that in the given

confined to that class only". See also *Tippu Khan v. Rajani*, 2 C 11 (F B), *Collector of Gorakhpur v. Palakdhari*, 12 A 1 (F B), *Rajani v. Bapu*, 10 B 439; *Lakshman v. Anrit*, 24 B 591; *Ramdas v. Ajpari*, 12 M 1; *Venkatasami v. Venkataradda*, 15 M 12; *Vythilinga v. Venkatacharya*, 16 M 1.

Person who would be likely to know The opinion must be of the person who are likely to know of its existence if it existed *Jugmohandas v. M*, 10 B 528 (542) In *Sariatullah v. Prannath Nandi*, 26 C 184, the question whether occupancy right was transferable by custom In deciding whether competent to prove customs the Court observed "We in the present case also the to know of the existence of

and I think that the opinion is out by the learned Judges under

custom *Nort* Ev 227. In *Wright v. Tatham*, 7 A & E 227, 5 Cl & F. 720, *Collman J.* asked: "Where boundary is proved by custom what is the guarantee for a man?" *Mr. Steel* replied: "The public

v. Sparks, 1 M. & S. 690, per *Baley J.*

Opinion as to usages, tenets, etc., when relevant

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family, the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people, S. 49

the opinions of persons having special means of knowledge thereon, are relevant facts.

Principle The matters mentioned in this section can only be proved by persons having special means of knowledge.

Scope of the Section The kind of evidence contemplated by this section must be the expression of opinion based on personal knowledge, and not the repetition of hearsay.

the existence of a fact information derived from deceased persons *Gurudhuaya v Suparandhuaya*, 23 A. 37-5 C. W. N. 33 (P. C.)-27 I. A. 238-10 M. L. J. 267 (P. C.)-2 Bom. L. R. 831 Where a certain member of a family accepted a certain interpretation of a clause in *Wajib-ul arz* the fact is admissible in evidence as to how a custom applying to the family is interpreted by members of that family. *Sharfuddin v Niamut Ali* 87 Ind. Cas. 8-A I. R. 1925 Oudh. 688 Opinion

R 6 O. 101.

omitting any reference to the legal effect. *Wigmore* § 1954 But the mere assertion of a "custom" does not involve opinion *Conner v R Co*, 148 Ind.

The effect is to be determined by the Court. *Hoskins v Warren*, 115 Mass. 514, 535, "The inquiry is not after the opinion of traders and merchants in respect to the law upon a given question, but after the evidence of a fact, to wit the usage or practice in the course of mercantile business" *Allen v Merchant's Bank*, 16 Wend. N. Y. 482, 488 So a party may examine witnesses to prove a particular course of facts, but not to show what the law is. 145 (149) It is sometimes said that a specific instances, or must at least a statement of the general practice.

Lord Mansfield and later Judges, *Edie v East India Co*, 1 W. Bl. 295 (297), 2 Burr 1216 (1222), *Mansfield* L. C. J. said "Many witnesses were examined by defendants to prove this

Denson, 7 C. & P. 711 (714) *Tindal C. J.* observed "Is there any general course of business? Let your mind revolve over instances I am not asking you whether it is just and proper, but whether there is any prevailing course of business." "But" says *Prof. Wigmore* "there is no rule of exclusion. The usage is itself a fact, and the opinion rule does not treat such testimony as an inference from data which can be adequately stated without the inference." *Wigmore* § 1954 This view is in accord with the opinion of Lord Mansfield, in *Camden v Couley*, 1 W. Bl. 417, where he ruled that insurance brokers and others might be examined as to the general opinion and understanding of the persons concerned in trade, though they knew no particular instance in the fact, upon which such opinion was founded. So the evidence of a well qualified witness as regards a trade usage, who could not state individual cases is admitted inasmuch as the *factum probandum* is not a single isolated act or

- S. 49. occurrence, but the result or conclusion derived from a series of facts or circumstances, creating and establishing in the mind of the witness a notion or belief of the complex whole. *Nicherson* 13 All Miss 351; *Wignor* of a witness as regards trade usage section 13, specific instances of usage this section all usages of trade and persons having special means of knowledge. 1 Sm L C 546.

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J. 240; *Lal Gajen*

W R (1864) 20

this section it can be

Family custom includes the custom of descent in a family and other customary

Tenets of any body of men. This will include any opinion, dogma, or doctrine which is held or maintained as truth. It will include religion, politics, science, etc. *Nort Ev.* p 228.

The constitution and government of any religious or charitable foundation. The opinions of constitution and, variant under this

Thus in *Shore v* early part of the eighteenth century, had, in the deed of grant, and objects of her munificence as 'Godly preachers of Christ's Holy Gospel' it became necessary to determine a few years ago what persons were

(308) where the grant of land was for a meeting house, the worship and service of God. The trustees and the majority of the congregation, having later ceased to be Trinitarian in belief a bill to rescind

v Briggs, 2 Car. & P 525; "in the Month of October" *Peake*, 41 *Barr* & *Reed* 321 T 710 "highly honoured" *Lane*, 17 *Taunt* 7 *Perrin*, 2 *conv* (v)

unless it comes from persons who are shown to have

There is thus analogy between opinion evidence under this section and hearsay evidence of custom based on hearsay. *Vide Per Parke B in Crease v. Barrett*, 1 Cr. M. & R. 929, *per Parke B*. S.

50. When the Court has to form an opinion as to the

Opinion on relationship, when relevant

relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person

who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act*, or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code†.

Illustrations.

(a) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant

Principle The question of presumption of relationship by conduct of parties often arises in cases of marriage and legitimacy. When the fact of marriage is in issue, subsequent conduct of the man and woman, said to have been the parties to it, is receivable to evidence the marriage. This conduct is traditionally spoken of as "habit", and this common source of proof, with the reputation evidence which usually accompanies it, has come to be known by the phrase "habit and repute". The logical nature of the argument indicates it plainly to fall under the principle, that from the conduct of the man and the woman as married persons may be inferred their firm belief that they were at some prior time made husband and wife, and from this belief may be inferred

Scope of the section This section is taken from section 649 of Taylor which is as follows: "Next, family conduct,—such as the tacit recognition of relationship, and the distribution and devolution of property,—is frequently received as evidence from which opinion and belief of the family may be inferred, as resting ultimately on the same basis as evidence of family tradition. For, since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material, in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or of affinity." The presumption in favour of wedlock is another instance of the rule *omnia presumuntur rite esse acta* (all things are presumed to be rightly and solemnly done) *Poz v. Bearblock*, 17 Ch D 499. It has its own special maxim *semper presumitur pro matrimonio*

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as man
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50 child should be severed in two parts, and that each take half; the true issue decided, upon that, that the child was a? Not, perhaps that mere declarations, may be made for a temporary purpose (in that case both women made declarations, and one of course false declarations); but it teaches that the conduct of a parent, the feeling a parent—those feelings being inferred from such conduct—afford evidence assisting us in arriving at a right conclusion as to the controversy. It has been argued at the bar that mere declarations of

ground for inference, for it comes from the least suspicious source, that the very individuals who are the most interested to give a different test in If there ever was a case where circumstantial evidence of this description admissible, it is this. In the same case

ment is sufficient evidence, if not rebut *Wigmore* § 269 So also the concealment husband *Hargrave v Hargrave*, 2 C & D 101 such child by the person who, at the time of its conception, was living in an of adultery with the mother and the fact that the child and its mother

the family appear to have been mentioned in the Will, and taken of such person is strong evidence to show, either that he was not the testator (the Will) (Tracey J.)

W. N 130 (P C)

conduct of parties is very true *Mullangi v Venkatas* 1851 F 515 Such evidence is also *Maharaja Perloo v Mahara*

§ C. 626 P C - 1 C L R 113

Proviso The proviso is inserted, because in divorce, a adultery and bigamy cases the marriage must be strictly proved, that is, by the evidence of a person who was present at the marriage, or by the production of the register, or such other record as the law of the country, or a class, may provide. *Nort* Ev 101 34-101 34-101 bigamy proof of second marriage is *U S. v. Miles*, 103 U S 301 But *Com. v. Jackson*, 11 Bush. (Ky) 679

an indictment or a civil action, the case for the prosecution is not made out S. 5

& W. 265; *Roscoe Cr.*
of the marriage, even
Williams v. Williams,

in *Morris v. Miller*,
: hat case the opinion of
to support an action

or criminal conversation, there must not be proof of an actual marriage; the
act was, they were married at *Manfair* Chapel; the register or books could not

plaintiff's power, (2) it was not an actual e ceremonial marriage, *Lord*

action . . . Perhaps there need not be strict proof from the register, or by a
person present, but strong evidence must be had of the fact,—as by a person
present at the wedding dinner, if the register be burnt and the person and clerk

as before. But an action for criminal conversation has a mixture of penal
purpose by
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1, 195 From
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ses of cases,

namely (1) where the charge is a criminal one and (2) in the civil action of
f of a marriage in fact" or actual
c. either by the register containing
of parson clerk or some other person

time, the action of criminal conversation occupied a far more prominent position
and was therefore more liable to abuse. *II ymore* § 2031. Nevertheless the rule

S. 50. of law as laid down by *Lord Mansfield* in the above two cases is applied in common law of England *Catherwood v. Castle*, 13 M & W 200 (1846) 11 Ex 116 days has

cient to prove a marriage in a prosecution for bigamy or in procuring a divorce, or in a petition for damages against an adulterer. But it is to put it too broadly. The marriage and subsequent ceremony upon the prosecution is based certainly cannot be so proved but it may be another marriage becomes material in such prosecution, and such marriage certainly be proved by a reputation, although it is proving a marriage prosecution for bigamy. Thus in the case of *R v. Wilson*, 3 F & 12 the prisoner pleaded that when she went through the first ceremony and

24 & 25 Vict C 100, § 57, Stat 20 & 21 Vic C 85 § 33. These exceptions rest on the ground that such proceedings, being of a penal nature require the strictest proof, and a further reason for the exception in the cases of

another, as well as the injury to the progeny by placing them without rights of legitimate children. Now this deception and

to be more cautious and tender in favour of an opponent in a criminal charge in which the opponent has placed himself on a level of meanness below that of the least meritorious opponent in any civil case. *Wigmore* § 2081.

Under the proviso to this section, in proceedings of the kind specified, the evidence is not to be received if it is not by itself sufficient to

in the ordinary way, i.e., by other and more reliable evidence, or by mere opinion of a person who, as a member of the family or otherwise, has special means of knowledge. *Queen Empress v. Subbarao*, 9 M 921 572. This is in accordance with the principle that strict proof is required in all criminal cases. *Empress v. Kallu*, 5 A 233 = 1 W 1. *Empress v. Plambar*, 5 C 566. But that principle is not applied inasmuch as in criminal cases a rule has grown up that the proof is not beyond a reasonable doubt. *Wigmore* §§ 4051, 2437. But according to

is section in all prosecutions for adultery under s. 497 Penal Code, the marriage must be strictly proved. *Gopal v. Emperor*, 4 Bur. L. J. 107 = I. R. 1925 Rang. 328. So the existence of a legal marriage has to be

S. 5

tion under s. 497, Penal Code the actual fact of the marriage between the

rem *Chand v. Hira*, A. J. R. 1927 B. 594.

51. Whenever the opinion of any living person is relevant, Grounds of opinion, the grounds on which such opinion is based when relevant. are also relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

Principle "The mere opinions of the witnesses are entitled to little or no regard, unless they are supported by good warrant them in the opinion of the jury. Exclusive, the opinions of the witnesses are w
1 *Harrison v. Rouan*, 3 Wash C. C. 587. "Opinion is no evidence, without assigning the reason for such opinion." *Per Duncan J. in Rambler v. Tryon*, S. & R. 94; *Wigmore* § 1917.

Scope of the section. In all cases in which opinion of experts are receivable, the grounds or reasoning upon which such opinion is based may also be required into *Phip Ev 4th Ed.* 362; *Gost of Bombay v. Merwanji*, 10 Bom.

S. 51. that case the Court observed, "The ground on which an expert, a

Court that the witness should be permitted to explain the ground is and of his opinion to the Court and jury, they may readily perceive the force reasoning, the soundness or fallacy of his logic, and therefore in a capacity to give an opinion on the subject and the correctness of his

taken to be true because the witness has stated that he founds them, but this is quite a mistake. In order to obtain facts the opinion

all questions of fact upon competent evidence laid before them

of science they may be aided by the more exact observation and experience of the trained expert." *Lauson Expert & Op Ac pp 21-22*

CHARACTER WHEN RELEVANT.

it is said of a person that he bears a good reputation, mean

Chamberlayne's S. 5
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position in this, that the latter is easily moveable, the former of longer
 ration and more difficult to be moved' I may notice that habit is formed
 or passion, and that this repetition
Metaphysics Vol I p 178 Habit
Chamberlayne's Ev § 3263

Act In explanation to section 55, the
 cter" includes both reputation and disposi-
 that actual character" says *Prof Wigmore*
 and the latter is merely evidence to prove
 common use of the word 'character' in the

hers, especially the popular opinion, whether favourable or the reverse
Standard Dictionary "Character lives in a man, reputation outside him"
Holland, Gold Bull, C 19 p 219 "Character is like an inward and spiritual
 vice of which reputation is, or should be the outward and visible sign"

of opinion arising from the deportment of a man in society As a man's deport-
 ment, good, or bad, necessarily produces one circle without another, and so ex-
 tends itself till it unites in one general opinion, that general opinion is allowed to
 be given in evidence" *State v Lanton*, 76 N C 216; *Burr Jones* § 153.

Scope of Sections 52 to 55 The framer of the Act has dealt with these sections
 under the heading 'character when relevant.' But in the explanation of section
 55 he has indicated how the character of a person can be evidenced We have
 character includes both
 erroneous. Character and
 cases the term "general
 But there are two distinct
 common use of one word

S. 52. for two ideas has caused confusion. (1) Is a person's disposition—or group of traits, or the sum of his traits—relevant and admissible for purposes? (2) Whenever it is so admissible as an evidentiary fact: becomes in its turn a proper first question is essentially in to exclude relevant character entirely different quarter, it has nothing to do with character, as an ev fact, but with the mode of proving character, assuming it to be provable either as an evidentiary fact or as an issue. *Wigmore* § far as the first point is concerned, character is offered as an ev fact—as a basis for an inference as to conduct—in section 52, 53 may also be a fact in issue (Vide explanation in the latter contingency, character not ut character in the sense of "general character" or "reputation" may also be a fact in issue, as in the case of a criminal case, proof of that character is always admissible. *Taylor* Best § 258. So also whenever character is relevant as a basis of an inference (than the inference of conduct), it is admissible without a *Chamberlayne's Ev* § 3307. But when a party's character is required proved not as a fact in issue but as an evidentiary fact to prove conduct generally excluded. So the general rule is that from a party's character conduct can not be presumed. So in civil cases a party's character evidentiary fact is wholly excluded. Such evidence can be given only in cases, where the amount of damage.

good character has been once established. But the bad character of a party in a criminal case may also be a fact in issue. In such a case of course, evidence of his bad character is always admissible. These are the questions which are essentially one of relevancy. Now we come to the second phase of the question: how the character is to be evidenced. Two special problems arise: (1) Opinion; (2) Hearsay, on what

observations of the conduct of the person under peculiar circumstances. (1) A man the estimated character, or reputation, of being honest, or of being cruel, or of being passionate, or humane, or cruel—this general character, as it is called, is also a fact; it is the opinion which those who are acquainted with him have proved in respect to his several traits of character. This is the mode of proving real character, which is the object in view. But it is not the fact itself.

admissible in more instances than the other. *Per Pearson* in *Jones* L. 160, *Wigmore* § 52. For further discussion on this point see under s 55 *infra*.

52. In civil cases the fact that the character of any person is such as to render improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

Principle Evidence of a party's character in a civil suit is irrelevant for two-fold reasons, namely, (1) A party's character is usually of no probative value in civil suits, and (2) The admission of such evidence would be unfairly prejudicial. **S. 1**

Issues and to orcefully stated

9 "But in a civil suit, where the personal rights of opposite parties are to be weighed in a nicely adjusted balance, no proof except that relating to the facts in controversy should be admitted to turn the scale" Here the rejection of evidence is on the ground of principal and evidence of good

admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime But in civil cases such evidence is with equal good reason not admitted, because no presumption would

would be infinitely
in *Stow v Conis*
not in issue, the
a very bad man may have a very righteous cause' *Thompson v Church*, 1
Root (Conn) 312 (1791) But in civil cases of a quasi criminal nature the
reason for exclusion is not so clear in principle and the Courts do not speak
§ 3275 In
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ful and nicely balanced, it may then perhaps suffice to turn the wavering scale;

or to form their opinion upon the opinions of others. The introduction of such

or bad simply renders his doing a particular act more or less probable. It has not the belief compelling power, in reference to the proof of the matter in question, of a probative fact, properly so called. *Chamberlayne's Ev* § 3266

words: § 2053 Evidence of good character of a party is not admissible in civil

S. 52. pursuant to a Statute to recover treble the value of property taken the Court said "All the rules of evidence applicable in civil cases are applicable to this" *Hall v Brown*, 30 Conn 551. So in an English case, [*Att Gen v. Bauman*, 2 B & P 532 note (a)] the question was squarely presented to the Court. The trial was of an information for offering to corrupt so with the defendant's character but the defendant was indicted for the crime imputed to him. The evidence was rejected. *Eyre C.B.* cannot admit this evidence in a civil suit. The offence imputed by the action is not in the shape of a crime. It would be contrary to the true distinction to admit it, which is this, that in a direct prosecution for such evidence is admissible, but where the prosecution is not directly for a crime, but for the penalty, as in this information, it is not. If evidence of character is admissible in such a case as this, it would be precluded in any charge of fraud upon the Excise and Custom House. *Chamberlayne's Ex* § 3260.

Crumm principle it received as a case, the more such action law of evidence and must be confusion with relevancy to make it worthy of consideration and to avoid, of course, similar objections exist in reference to the use of such evidence in criminal cases, but they are disregarded by reason of the humane principle in view of the fact that in criminal cases human life and liberty are at stake. *Chamberlayne's Ex* § 3260.

Character in action for fraud. Where the nature of a civil action involve the general character of a party, evidence as to that character may not be offered to contradict an imputation of dishonesty, or even of fraud in a transaction presented in an ordinary civil case must depend upon the facts and circumstances, and not upon the character of the parties. In such a case, how serious a moral delinquency may be involved in a fact and the establishment of that fact may affect a party's reputation, he cannot rely on the aid of his previous reputation to disprove the fact. *Strob* (S C) 372. The doctrine has been announced in a few cases in the Courts that, if a party is charged with fraud or other act involving turpitude and the charge is based only on circumstantial evidence, he may rebut the charge by proof of his good character. *Henry v. Brown* (Ten) 213; *State v. Becht*, 17 *Walker v. Stephenson*, 3 Esp. has said "And generally it is not admissible to repel it." *Greenleaf's Ev* § 51. But this view is not upon any principle of law.

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mistake yourself The testimony of your evil behaviour going to church,

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this is well But you are

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88 Ala. 221

"It is needless to dwell on the fact" says Mr *McKelvey* "that the character

"the offence

"is limited"

Character

than of the

53. deed in question. This relevancy depends on the assumption that it was substantially unchanged in the meantime. Character at the earlier or later time is offered not to prove or disprove the act in question but to prove the character at the time when the deed in question was done. All that is required is that the character must relate to a period proximate to the period of the offence. *R v Suandson*, 14 How St. Tr 596. Similarly character in one place stands on precisely the same footing as character in another place. The person is the same wherever he is and it is a matter of fact that the test of

reputation in a community other than the prisoner's home may be all for *Hignore* § 60. So far as this section is concerned which deals with relevancy those questions do not arise and more so as under the Indian Evidence Act character includes both reputation and disposition. No importance can be attached to evidence of good character where the case again is the same. *Queen E* *Nur Mahomed*, 11 B 223.

Effect and operation of evidence of good character. Good character should be permitted to operate as a positive, appropriate and sufficient defence. No distinction should be made, in application and effect, between evidence to prove exculpatory facts and evidence to prove the character of the accused. *State v Murry*, 118 Mo 7, 25, *Stannard*, 7 C & P. 673. Both rest on the fact making strongly

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turn their attention to his good character. [Vide *R v Dawson* (1866) 11 St. Tr. 99 at p. 217 per Lord Ellenborough] It is, however, submitted in deference, that the good character of the party accused, when established, is an ingredient which ought always to be submitted to the jury together with the charge as an ingredient in any case, on its own conclusion previously he is called upon to answer. 2 *Russ Cr* 74. The correct rule is that in cases of a good character, if proved, to the satisfaction of the jury must be considered. *Percy v Van Dam*, 107 Mich 425.

just if it is established

question of the guilt or innocence of the accused. The jury have no right to separate it from the mass of the testimony, and to say that they have concluded that the accused has a good character and that therefore they will infer his innocence of guilt. *Suett v. State*, 75 Neb 263. But while proof of good character alone may not be sufficient as against proof of guilt beyond a reasonable

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a life of honesty during the past, is no reason to suppose that he will not succumb to temptation at the close of his career, but before a man of this type and such antecedents is adjudged guilty, the evidence against him must be of an unimpeachable character *Mangat Rai v Emperor*, 10 Lah L J 262-29 Cr. L. J. 740

Trait must be relevant It is a rule well enforced by reason and sanctioned by authority that character evidence, introduced for the purpose of laying a

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character should relate to a period proximate to the period of trial *R v Swendsen*, 14 How St. Tr 696

Adultery In a criminal prosecution for adultery, the previous good character of the defendant for chastity is admissible in his favour *Chamberlayne v R* § 3289

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Assault The defendant's good character as a peaceable, law abiding citizen is admissible in his favour in a prosecution for assault with intent to

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the commia-
relevant. For

example, the accused in a criminal action for burglary who had been employed

S. 53. on the police force of a city was not allowed to show by the chief of police that his work had been of a satisfying character *Chamberlayne's Ev* § 3292

Carr
peaceable,
carrying
offence

Fraud In criminal actions for fraud or involving fraud, the good character of the accused with respect to the truth involved may be shown in his life but his personal habits or character for sobriety and morality are not relevant likewise his reputation for industry. *Chamberlayne's Ev* § 3294

Homicide Character evidence is probably more frequently used on

in such a case to the accused has sometimes led to a liberal construction of a general rule. The good character of the accused for peaceableness and industry is admissible even where the instrument of death was poison. Example: evidence, offered as character evidence on behalf of the accused, that he had been excluded are that the accused was industrious and honest, a valiant worker. That the accused may, on the other hand, be engaged in selling whiskey, was unchristian or that he was a drinking man, there was no evidence that he had been drinking on the occasion in question. *Chamberlayne's Ev* § 3295

Indecent assault The character of the accused for chastity is relevant in such actions.

are the victim is other than a child, regarded as the only relevant character trait would seem that other traits as cruelty, brutality and their opposites ought often to be considered in view has been recognized in a case of infanticide wherein the accused was allowed to show that he was of a humane and kindly disposition towards children. *Chamberlayne's Ev* § 3293

Larceny In larceny cases, proof of character must likewise be confined to the trait involved in the crime, honesty, being regarded as such trait of good character of the accused for truthfulness is not admissible in his case nor is his character in respect to sobriety. *Chamberlayne's Ev* § 3290

Libel The reputation of the accused in a prosecution for criminal libel for truth and veracity, is inadmissible as is likewise his reputation for peaceableness and orderliness. What trait would be relevant in a libel case appears to be honesty. *Chamberlayne's Ev* § 3300

has
Howe
establ

Rape The Courts have experienced some difficulty in the case of a trait of character of the accused in a prosecution for rape is in his favour. His reputation for "morality, virtue and honesty" in his life is relevant in that context. If the accused is shown to have committed rape, the defendant's reputation for chastity and

is rejected as was likewise evidence of his general character. The reputation of the prosecutrix in rape for chastity may always be shown by the accused as being on the question of consent. It must be observed that proof of character of the female involved in all cases of this general class, which includes adultery, rape, seduction and the like, is proof of the character of a person placed upon proof of character by the prosecution in the first instance. *Chamberlayne's Ev* § 3303.

Receiving stolen property. The trait of character regarded by the Courts as relevant in a prosecution for receiving stolen goods is honesty. The accused may introduce evidence of his character for honesty and probity for the purpose of raising an inference that he is not guilty of the crime charged but traits other than honesty are not regarded as relevant and are therefore excluded. The language, however, which is used to express that general trait may vary, the words probity and integrity, for example, not being objectionable. The reputation of the person from whom the goods were received as a regular and honest dealer in goods such as those in question is relevant on behalf of the accused. Such evidence bears upon the good faith in which the goods were received and tends to prove absence of criminal intent. *Chamberlayne's Ev* § 3304.

Seduction. Character may not be introduced in rebuttal the trait of character for virtue as accused of the crime. *Chamberlayne's Ev* § 3305.

Train wrecking. In a prosecution for attempting to wreck a train by placing a tie upon a railroad track, the good character of the accused as a peaceable, orderly and law abiding citizen was held admissible in his behalf. *Chamberlayne's Ev* § 3306.

54. *In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Previous bad character not relevant, except in reply.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.

Requires. The evidence is relevant to the issue, but is excluded for reasons of

* This section was substituted for the original section 54 by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s. 6

- S. 54. *Nath*, 10 W. R. Cr. 17; *R v. Tubersfield*, 10 Cox. 1; *Amrita I Emperor*, 42 C. 957. But after a defendant has attempted to shew character in his own aid, prosecution may in rebuttal offer as evidence character. *Wignmore* § 58. The reason for the reception of this evidence stated by *Earle J.* in *R v. Boulton supra*: "If the prisoner, by shewing character, misleads the Court... the false impression should be corrected." See also *Per A.* *Shrum* Cr. C. 322. In *Shrum* by own character "v. *Per* 333 (339).

Old Section. Before the amendment of the section by Act I s. 6, the section ran as follows: "In criminal proceedings, the fact that an accused person has been previously convicted of any offence is relevant if it is proved that he has a bad character is irrelevant unless evidence has been given that he has a good character in which case it is relevant (English section does not apply in fact in issue)." Conditions are in every

case had been given of good character or not. *Queen-Empress v. Karich Das*, 14 C. 721; 2 Weir 760; *Empress v. Sukha*, A. W. N. 1886; *Roshun Dosadh v. Empress*, 5 C 763=6 C. L. R. 219. In framing the section the framers of the Act said: "We permit evidence of previous convictions against a prisoner for the purpose of prejudicing the jury. We do not see why he should not be prejudiced by such evidence, if the Report of the Select Committee see also *Queen-Empress v. Karich*

Queen-Empress v. Hughes, 14 A. 25=A. W. N. 1891, 170.

Scope of the present section. As a general rule the badness of character is not a fact in issue, or relevant to the issue, that he is of bad character or that he is of the same kind of offence as that of the accused. It is competent for the prosecutor to adduce evidence tending to show that the accused has been guilty of criminal acts.

Sir James Fitz-james Stephen in his *general view of the law of evidence* says: "It is an inflexible rule of English Criminal Law that a man's character is not relevant to the issue of guilt in a criminal transaction." *Woodroffe's Lr.* p. 451. Under this section the

which has a bad character is irrelevant, and cannot be admitted whether introduced by the prosecution or by the defence. *M. Myn v. King-Emperor*, 6 L. R. 4-9 Cr. L. J. 576-2 Ind. Cas. 349; see also *Emperor v. Wahiduddin*, 54 S. 54

before the passing of the Indian Evidence Act. *Queen v. Mahima*, 6 B. L. R. 131-15 W. R. 37 Cr.; *Queen v. Behary* 7 W. R. 7. Cr.; *Queen v. Phoolchand*, 11 W. R. Cr. 11; *Queen v. Gopal Thakoor*, 6 W. R. Cr. 72; *Queen v. Bykunt*, 10 W. R. Cr. 17; *Queen v. Kulam Sheikh*, 10 W. R. Cr. 39; *Reg v. Timmit*, 2 B. H.

in consideration for the accused was tried, and evidence for which he was

accused person has not been

Cr. L. J. 411. Such as if he has a good character or where the bad character of any person is itself a fact in issue. *Wazir v. Empress* 7 P. R. 189 Cr. Except for the purposes of Act III of 1875, as other *Emperor v. L. R. 1034*. relevant fact under s. 14 of the Act. *R v. Naba Kumar*, 1 C. W. N. 146. In a trial for an

evidence which is required to prove a motive for the crime which is otherwise irrelevant. *Jagua v. Emperor*, 5 Pat. 63-93 Ind. Cas. 834-7 Pat. L. T. 396-397 I. R. 1926 Pat. 232. See also *Emperor v. Aloomiya*, 5 Bom. L. R. 805-28 129.

particular locality. And in regard to this second question the ordinary rules of evidence do not apply or at least are greatly relaxed. The Indian Law has

S. 54. adopted the policy of leave discretion of the Court no bearing whatever upon; after an accused charged it is relevant for the purpose of enhancing the sentence to be put on him. *Emperor v. Nga Ba*, 111 Ind. Cts 453=29 Cr L J 40; 1928 Rang 200 (F. B); see also *Emperor v. Ismail* 39 B 30; *Emperor*, A 1 R 1929 Mad 306. So also records of such convict or put at the end of the trial *Queen v. Shuboo*, 3 W. R Cr 33; *Delmer* 50 C 367.

Accused person's bad character is relevant The evidence to prove that the accused person's character is such that he is likely to be the author of the cheating v. *Goun*, 26 P W R v. *Emperor*, 48 C L J of the accused in the character *Felsenthal v. State*, 50 Cal App 2d, 111

rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. The protection of law is due to the righteous and unrighteous. The sun of justice shines alike for the good, the just and the unjust. The crime must be proved, not for the contrary, the most vicious is presumed innocent until proved guilty. The admission of a contrary rule, even in any degree, would open the door only to direct oppression of those who are vicious because they are weak, but even to the operation of prejudices as to religion, race, colour, character, profession, manners, upon the minds of honest and well-disposed persons.

White, 24 Wind. 574 *Wheeler*

disposition is not relevant *White*, 1 Phil Ev 603 *The State v. Peckham* 1 in *People v. Peckham*

N Y 78 (Am), when he said: "Two antagonistic methods for the investigation of crime and the conduct of criminal trial have existed for many years. One of these methods, favoured, this kind of evidence is that the tribunal which is engaged in the trial of the accused may be influenced by the whole past life of the accused, and by his character, and by his disposition." This is the method which is pursued in France, and it is claimed that it is more just to be done where such course is pursued than where it is omitted. The law of England, however, has adopted another, and, so far as the party is concerned, it is more just to prove the crime by the evidence of the crime itself.

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is an exception (which is a peculiarity of precedents of the law) in the case of relevant evidence of a defendant's general and notorious character, which evidence is relevant, the law acknowledges by receiving in criminal cases, in some civil cases, evidence of a defendant's good character in his past life, allowing such evidence to be rebutted; and by receiving evidence of the character of witnesses and of other persons. The exclusion of such evidence is a plain departure from the material evidence in the case of a defendant's character to mitigate the way of its operation. It is given for the purpose of showing that the accused was not likely to be the author of the crime charged. But after a defendant's character is proved, it is not necessary to prove the crime by the evidence of the crime itself.

Emperor, A I R 1931 Pat 345=12 Pat L T. 471 But evidence is otherwise relevant if it is not rendered inadmissible merely because it shows bad character the admission of offences other than the offence with which the accused is charged. *Saraj v Emperor*, A I R 1932 Cal 474.

S. 54,

examined R v
B 464=90 L J
in man slaughter, it
seemed he ran down
and killed a boy, the accused in cross-examination was repeatedly asked and

was called by the accused for the sole purpose of producing some letters This

was not endeavouring to establish a good character merely because a witness whom he called volunteered a statement as to the appellant's good character not only uninvited but probably also against the appellant's wish, and therefore the
of bal
put his c
(Am),
incident.

that he should have the advantage of a character which in point of fact is undeserved R v Rounton, L. & C. 520 (5-9); Wills' L. 2nd Ed 55. 150
I. E. A.—101.

S. 54. prosecution may rebut the evidence of good character either by cross

C. & P. 6

App R. 113

only be t

prevent the accused person from pleading that the act under consideration committed without a dishonest intention. *Emperor v. Bahadur*, L. R. 313=102 Ind. Cas. 492=28 Cr. L. J. 556. The presumption of evidence of good character, and of the fact that an accused person is a man of good family connection, which would render it *prima facie* unlikely he would be guilty of crimes of violence, cannot be pressed too far in cases of offences originating in extreme political feeling. *In re Lorge*, 6 M. L. T. 17=11 Cr. L. J. 30=4 Ind. Cas. 700. But in other cases character of an accused person, and the insignificance of the gain which result from the offence committed by him are circumstances which in cases have occasionally great weight, but neither of them can displace and undisputed facts. *Government of Bengal v. Umesh Chunder*, 16 C.

must

involve

in which the evidence is offered. *Chamberlayne's Ex.* 3555. Any other traits is irrelevant. *Vide notes under s. 53.*

Previous conviction when relevant under other law. Previous conviction may also be relevant in cases where the accused is liable to enhanced punishment; *vide s. 75 of the Indian Penal Code; ss. 221, 310, 311, 311 of the Procedure Code.*

Explanation I. This section is not applicable in cases when the fact of a previous conviction is relevant under other law. *Emperor, A. I. R. 1-*

of that section. *Sher Zaman v. Empress*, 10 P. R. 1800. 44 of the Evidence Act.

of bad character is admissible.

murder to prove that the accused

as being evidence of character it is admissible. *Khilauan v. Empress*, 5 O. W. N. 1928 Oudh. 430.

Explanation II. Whenever under this section evidence as to the character of an accused is admissible, his previous conviction is also admissible as evidence of his bad character. But in other cases evidence of a previous conviction is not admissible unless accused produces evidence of a good character. Such evidence of the previous conviction of an accused amounts to evidence of bad character. *Teka Ali v. Empress*, 5 P. R. 76=60 Ind. Cas. 331=23 Cr. L. J. 219; see also *Bahadur v. Empress*, C. L. J. 578; *Emperor v. Dunning*, 5 Bom. L. R. 1031. The evidence of a previous conviction may be considered in enhancing the sentence after the conviction is proved. *Rahim Bux v. Empress*, 5 O. W. N. 124=103 Ind. Cas. 124. Strict proof must be given of previous conviction. *Emperor v. ...* Upon the conviction of an accused, the Court has to determine whether the

award, and, to do this, should take into consideration, not only the nature and gravity of the offence committed, but the character of the accused then before the court, and the character being admissible as affecting general reputation and general disposition and not of particular acts by which reputation and disposition is shown. Evidence of character for the above purpose. *Naga Po v* The object of this section is to lay down

S. 55

N 351, see also *Rahim v*

Character of prosecutor when relevant In a prosecution for rape or for attempting to cross-examine the prosecutor as a general bad

may call evidence to rebut it. *Wills Ev 2nd Ed 86*

55. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation.—In sections 52, 53, 54, and 55, the word “character” includes both reputation and disposition, but *except as provided in section 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

Principle The possession of a particular trait of character or the contrary by one of the parties to a suit in that regard must often be

aw of
The
larger

*These words and figures in the *Explanation* to section 55 were inserted by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s 7.

S. 55. amount of damages, while a contrary finding may properly result award of damages or none at all. Reputation rather than actual character usually investigated as that is commonly the important consideration; it is difficult to always draw a line of demarcation between the two related (in law) intangible subjects *Chamberlayne's Ex* § 3503.

Scope of the section. In civil cases, good character being proved, not be proved in aggravation of damages; but the party attacked may meet evidence of specific acts of impropriety by disproof of such acts, not by evidence of general good character. *Jones v Janes*, 13 L. J. 111; *Narracott v Narracott*, 33 L. J. P. & M. 61, Pamp. Ex. 714; *Ellis v Ellis* (vide infra), the plaintiff's reputed character may be considered, in award of damages, in any other action in which the law of damages requires harm to reputation as one of the elements of recovery. This has also been conceded for the actions of seduction, criminal conversation, breach of promises of marriage, malicious prosecutions, etc. (vide *Per Rix v C B* in *Bell v. Parke*, 11 Ir. C. L. 423, 475).

It is not admissible to affect the question of damages, is a point which has been controverted. On the one hand it is urged, that the admission of such evidence would be cruelly unjust, as it would throw upon the plaintiff, who

is not admissible to affect the question of damages, is a point which has been controverted. On the one hand it is urged, that the admission of such evidence would be cruelly unjust, as it would throw upon the plaintiff, who

cannot be a good man, even by means of the very action which he sues himself from the effects of malicious slander. *Per Graham B* in *L. J. 11 Price* 235, 256, 269. In the same case *Garrow B* said. "It is not to become the law that such evidence should be admissible, the law is not to become such a law."

tion; that every man who demands compensation for injury to his character ought to be prepared to rebut any evidence of his bad character; that the danger of admitting testimony of this kind is great, since the witnesses, on cross-examination, might be compelled to give grounds of their belief, that, as any failure in the evidence would much increase the damages, witnesses would naturally be inclined to support of a decisive case; that the law will not presume in

criminal conspiracies to ruin reputations, and cannot be moulded to suit the S. 1

best, if not only, arrive at a safe conclusion on this point, by inquiring what opinion was previously entertained respecting him, by those with whom he was

person of whom they are made, he had a right of action. The damage, however, which he has sustained must depend entirely on the estimation in which he was previously held. He complains of an injury to his reputation, and seeks to

damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantity of damage, the previous character is not only material, but is said that the admission of such

friends who have known him to prove that his reputation has been good.' *Wigmore* § 70, *Wood v. Durham*, 21 Q. B.

of the character of the plaintiff without the leave of the Judge unless seven

If the general issue is pleaded, the amount of damages is properly in issue, and

criminal conspiracies to ruin reputations, and cannot be moulded to suit the convenience of irrational timidity; that to estimate the extent of the injury which a plaintiff has sustained, and, consequently, the amount of damages to which he is entitled, the jury must first ascertain what was the real value of his character at the time when it was attacked by the defendant, and that they can

recover damages for that injury, and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation. 'To deny this would', as is observed in *Stallis on Evidence*, be to decide that a man of the worst character is to be placed on the same footing as a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantity of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential. It is said that the admission of such evidence will be hardship upon the plaintiff,

friends who have known
Wigmore § 70, *Wood v*
 defamation the defendant,
 in substance and in fact
Wood v. Durham, 21 Q. B.

rumours or
English
 Art 57,
 Per Add

70, *Llleschan v Robinson*, 2 St Lx 641;
Barber, 2 St Ev 641, *Kirkman v Onley*,
 11 Price 235 *Wadhman v Weaver*,

D & R. N. P C 10, *Cornwall v Richardson*, Ry & M 307, see also notes
 under § 12 at p 176 *supra*. But in England where the defendant does not
 plead the truth of the libel he cannot give evidence in chief in mitigation of
 damages, of the circumstances under which the libel or slander was published,
 or of the character of the plaintiff without the leave of the Judge unless seven

If the general issue is pleaded, the amount of damages is properly in issue, and

S. 55. the result is
pleaded, &c

mitting the plaintiff's bad reputation
1) his general bad reputation alone
-- for the particular trait involved in the
tion, e.g. honesty, chastity, etc., or (dth) both may be used. *Gr*
§ 14 (d).

Seduction Character evidence of the daughter is admissible in an
for seduction, for here the disgrace to the father must naturally be
lacking if the daughter is already of bad reputation for chastity, her
bad reputation may therefore be shown. *Damfield v Massey*, 1 Cas
Dodd v Norris, 3 Camp 519, *Carpenter v Wall*, 11 A & E 804, 11
§ 75 The father's own reputation is immaterial. *Ibid* In such an action
element of damage is the wounded sensibility of the injured party.

shown *Smith v Milburn*, 17
§ 3308, *Phip Ev 7th Ed* p 186.
character is not admissible under
supra

Criminal Conversation In an action for criminal conversation the
previous bad reput.
305 § 75, *Smith v*
reputation is immaterial
or character, for this
well serve in mitigation, in as much as the loss of his wife's virtue

thus the reputation is here relevant
note § 75; *Bromley v Wallace*, 4 E.
character is in question.

he can claim
362; *Jones v*

T. N. 11, *Narracott v Narracott*, 33 L. J. P. & M 61

in an action
reputation
The plaintiff
the 153
from an

assault would be less than that of a modest and virtuous woman
Work, 13 R. L 643, *Wignmore* § 75

the bad character of the
is clearly in
mitigation of
such a
woman is
none of
is of, immaterial

unchastity a defence the defendant must not only prove

unchaste, but also that he had no knowledge of such unchastity at the time of making the promise to marry. *Foster v. Hanchett*, 68 Vt. 319 (Am.).

S. 55

Malicious prosecution In actions for malicious prosecution, the defendant may show the general bad reputation of the plaintiff as known to him when he launched the prosecution. *Martin v. Hardesty*, 27 Ala. 458 (Am.), *Hamberlayne's Ex* § 9308

Explanation. rac-
er cannot include ion.
'That actual charac- it,
and the latter is merely evidence to prove the former, ought to be a truism."
Wigmore § 1608 "The term 'character' when more strictly applied, refers to
his inherent qualities of the person, rather than to any opinion that may be
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so that
bject, a
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subject are
character'
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n *Bucklin*
traufords-
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on really
re § 1608
rm "cha-

55, has been used in the sense of
to prove the disposition of a person,
e given and to prove his reputation, his

English law Under the English law the term 'character' was normally applied to the actual qualities, and not to the community's estimates of these qualities. *Wigmore* § 1931 In *Thomas Hardy's Trial*, 24 How St Tr 990, evidence was admissible to the effect "I have always esteemed him as a man of a mild and peaceful disposition"

Trial, 31 How St Tr 186, *Lord Ellenborough*.

as to the general character of the accused,
likely to be guilty of

§ 1931, see also *Trial of*

1160 ff, *Fernley's Trial*,

How St Tr 40, *Butler's*.

spoke from personal knowledge alone, and often (though less frequently) from personal knowledge plus reputation, but to speak from reputation alone is regarded in the 1700 S as improper. On this point the law in England was afterwards changed and allowed reputation alone. *Wigmore* § 1931 In *Jones Trial*, 31 How St Tr 310 (1809), *Lord Ellenborough C J* incidentally said. "It is reputation; it is not what a person knows" But the isolated phrase above in *Jone's Trial* somehow caught the attention of later

the usage of the term character in this connection. *Parks Ex* 2nd Ed 8 (1802), *McNelly Ex* 321 (1814) *Starkie Ex* 1st Ed Vol. II, 366 (1824); *Phillips Ex* 1st Ed 72, 103 (1814) That personal belief, estimate, or knowledge—under whatever name—was proper and unquestionable testimony to character seems
whole period
Cox Cr. 25, *Cockburn C. J.*

prisoner, as to show the means they had had of forming an opinion upon his disposition. The first witness stated the length of time that the prisoner was not

Then
possible.

Each of the witnesses was asked as to his means of knowledge and his opinion of the prisoner's disposition, and Lord Ellenborough says, 'the correct inquiry is in the general character of the accused and whether the witness thinks him likely to be guilty of the offence charged in the information' This is very strong proof that the practice is to stop a witness when he refers to particular

gave his answer according to the
that experience. But the witness a
brothers. Strictly that specific fact
involving a very important question, I cannot rest my decision on the particular

cular witness, is superior in quality and value to mere rumour. Numerous

character, because the prisoner was charged with an offence which would not only be committed in secret if it were committed at all, but would be likely to be kept secret by the persons who were subjected to it. Such being the case,

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fraud?
borough's
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attended to. In 1791, in *Hardy's Case*, 21 How St Tr. 999, there is a passage in the examination of witness, *John Carr*, which shows what was then regarded as the true rule, and how common it was to disregard it. 'How long have you known Mr. Carr? Towards of twenty years. Have you known him well during that time? The

—From what you know of
acts of violence? Never.—*My Attorney General.* That is a question never put,

S. 55. that a prisoner is entitled to give evidence as to his general character. What does it mean? Does it mean evidence as to his reputation as to those to whom his conduct and position are known, or does it mean evidence of disposition? I think it means evidence of reputation only. I have heard of a question put deliberately to a witness called on behalf of a prisoner as to the prisoner's disposition of mind; the way, and the only way, in which I find the word 'character' used and applied in all the books of text-writers of authority upon the subject of evidence. When we consider the question of what, in the strict interpretation of the law, is the limit of such evidence I must say that, in my judgment, it must be confined to this: the evidence must be of the man's general reputation, and not of the individual opinion of the witness. The witness who acknowledged that nothing of the general character or sense of reputation, would not be character in more limited sense.

Blackburn, Byles, Keating, Mellor and Piggot, B B, concurred and Earle C J said: "What character is admitted? It seems to me that such evidence is admissible for the purpose of showing the disposition of any party accused, and but for the presumption that he did not commit the crime imputed to him cannot be ascertained directly; it is only to be ascertained by the opinion formed concerning the man, which must be founded either on personal acquaintance or on the expression of opinion by others whose opinion again must be founded on the estimate which the Court has formed on the evidence and state that estimate which the prisoner has enabled to be admissible. You may examine the prisoner's neighbourhood, the personal judgment of those who are capable of forming a moral and guiding opinion than that which is to be gathered from general reputation. I have never seen a witness examined to character without an error."

esteem and respect, and have had abundant experience that we are the worthiest men in the world. The principle the Lord Chief Justice laid down would exclude his evidence, and that in the point, where I differ from him. To my mind personal experience gives cogency to the evidence; and I have heard some persons speak well of him, and I have heard a very able general report in favour of the prisoner, has a very able comparison. Again, to the proposition that general character is admissible the answer is that it is impossible to get at it. There is no such thing as general character, it is the general inference supposed to arise from the statements in favour of the prisoner.

upon the branch of the case have commanded my assent. In the case confirmed by the case of *Rex v. Darison*, 31 St. Tr. 117, in which *Ellenborough* held that the personal experience of a witness founded upon his personal experience, was admissible. In the case of *recollection* there were thirteen witnesses to character called. Five or six gave evidence of very considerable personal acquaintance.

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evidence than that of a witness who testifies to the general repute of this person as to this mental characteristic? His testimony is based upon hearsay, and quite likely rumour and goes up. If mental characteristic is a fact, there is no valid reason why this fact should be proved by general repute.

Personal observation is more reliable than general repute. It is based upon the observation of others to which from those who know." *Wigmore* § 1956. Similarly in *State v Lee* 22 Minn 469, *Berry J* said "As it is the fact of disposition which is important and material, there can be no reason why this fact may not be proved by any witness who knows what it is. There is certainly no reason why general repute is any

Except as provided in section 54. The character evidence as contemplated in section 54 is not confined to general disposition or general reputation. The character or disposition offered whether for or against him must involve the specific trait related to the act charged. *Wigmore* § 59. "The object and effect of such evidence is to disprove guilt by furnishing a presumption that the defendant could not have committed the offence and hence the character sought to be proved must be such as would make it unlikely that the party would do the controverted act." *McClellan J* in *Morgan v State* 88 Ala 221 (1st), *Wigmore* § 59.

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it a fact.

It may be a part of the very issue, as where the reputation of a plaintiff is in issue to determine the damages in an action. In issue, in respect of concern this case, (2) the right to testify to

regards p

accusation may have contributed to colour the reputation and render it untrustworthy. *Grice v. E.* § 461 (d), *Chamberlayne's Ex* § 3329.

Nature and formation of Reputation. In enquiry into the limitations affecting the nature and formation of a reputation, it must be remembered that

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reputation is used only by way of an exception to the hearsay rule; it must therefore take such a solid and definite shape as to be worthy of, and to justify the exceptional resort to such evidence. Mere rumour, coarse not reputation of the community as a whole, but what the community
Scott v Sampson, L R 8 Q B D 491. If the public opinion be of

proportion of them, should have been heard to speak on the subject, if

the person's veracity or honesty or other quality in question is not deemed to be equivalent and therefore to be trustworthy only so far as the facilities of ascertaining persons among whom he has merely sojourned; the form of the question usually put is, "What is the opinion in the neighbourhood?" *Greenl Ev*, 103. Another aspect of a man's reputation, for example, may declare him honest, and yet a rumour may have circulated that this reputed honest man has defrauded accounts. *Wigmore* § 1611.

The persons qualified to testify to reputation. The witness to reputation must be one who, by evidence in the community, or otherwise, has had opportunity to learn the community's estimate, and the preliminary question whether he knows the person's reputation, is usually insisted upon. *Wig v Norris*, 103 Mass 566. A person who lives out of the neighbourhood is therefore not qualified and it has been doubted whether a person can express purpose of learning the reputation of another. *4 Esp 102*, *Douglas v Turner*, 10 V 236, *Greenl Ev* § 161 (d), *Chamberlayne's Ev* § 3315.

Cross-examination of a witness to reputation. In testing a witness who speaks of good character, it will expose the unworthiness of his testimony if he admits that rumours of misconduct are known to him, for knowledge of such rumours may well be inconsistent with his assertion that the person's reputation is good. *Wigmore* § 1611. In fact, the propriety of reputation he has supported usually been conceded. Cross-examination may be tested on cross-examination by requiring him to speak of his information, and in particular the persons whose remarks have given rise to his assertion. *Wigmore* § 1611. It is conceded to be proper. *Wigmore* § 1611. *Greenl Ev* § 161 (d), *Chamberlayne's Ev* § 3311.

It is impossible to exact unanimity; for there are always dissenters. It is precisely that quality of public opinion thus commonly described as "the average" therefore a difficult thing. *Wigmore* § 1612. "A reputation is a

putation at all, must be a general reputation. It may be either one of two opposites; for instance, either good or bad; or it may be partly one and partly the other; but in any case, it must be a general reputation. It could then be no general reputation if it were only a partial, limited, or qualified reputation. The existence of a diversity of opinion is one of the means by which a witness may know there is general reputation, but this means of knowledge, apart from the fact that there is or is not a general reputation, is not sufficient to establish the fact.

actual commission of the crime. In the matter of the petition of Poldia Siva di, 3 M. 238 = 2 Weir 51

General Disposition. Here the character is applied to the actual qualities of the person, not to the community's estimate of these qualities. The term "general disposition" is distinguished from the "particular character" (i.e. general disposition showing it) seems to have been the original and natural source of the phrase and the orthodox application of it. In *Layers' Trial*, 16 How St Tr 246, various discreditable facts being

the particular facts to charge the reputation of any witness, but only in general

itself." *Wigmore* § 1981. In *R v Cobbit*, 2 State Tr. N S 789, 873, Lord Alderden C J said, "The proper inquiry for a gentleman who has known Mr. many years is as to his general character, not as to any individual or particular acts . . . you may ask, wh

particular witness—such opinion being the result of the witness's personal experience and observation—will also be evidence as to his character. But the evidence need not show that such general opinion is based on the personal knowledge of the man by his neighbours generally, nor does it show that such general opinion has been publicly expressed by his neighbours. *Duma Singh v. the Emperor*, 5 O C 203

PART II.

ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED

S. 56. Fact judicially noticeable need not be proved

56. No fact of which the Court take judicial notice need be proved.

Scope of Part II In part I of the Evidence Act, what facts what facts may not be proved in a civil or criminal case has been dealt with. After ascertaining that question, the framers of the Act now propose to deal with the question what sort of evidence must be given

the contents of a document, must be proved by oral evidence. Oral evidence must consist of an affidavit or of a deposition taken in the presence of the parties.

been reduced to a documentary form, the document in which that transaction, and its contents cannot be varied by oral evidence though the contents of the document. *Step Day Et 1*

Proof The terms "evidence" and "proof" are often used in such a way as to include at one time the media by which facts are established, and at another time the effect or conclusions produced by the testimony. It is true the attempt is frequently made to distinguish between the two terms "evidence" and "proof".

more of a technical term, proof accurately, proof produces assurance and certainty. Evidence, therefore, is the cause from effect. *Wills Civ Ev 2, 3; Green Et 1* The words "evidence" and "proof" are often used as synonymous, in strictness, however, the latter is used as a synonym for "proof". It is true the attempt is frequently made to distinguish between the two terms "evidence" and "proof". *Jastrzembski v Marxhausen, 120 Mich 677-79* tends to convince" *Jastrzembski v Marxhausen, 120 Mich 677-79* 935 (Am); *Burr Jones § 4*

Scope of Chapter III The second chapter having decided what facts are relevant we proceed to show how a relevant fact is to be proved. In the first place, the fact to be proved may be one of so much notoriety that the Court take judicial notice of it, or it may be admitted by the parties. In either of these cases no evidence of its existence need be given. Chapter III, which relates to judicial notice, disposes of this subject. It is taken in part from Act II of 1908.

part from the Commissioner's Draft Bill, and in part from the Law of
 gland" *Draft Report of the Select Committee—The Gazette of India, July, 1,*
Part I, p. 271. "W

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es, needs to be commu

known already, and

ted and reasoned upon without discussion. Often, also, much of which
 re might, in point of mere theory be a doubt, will, as a matter of established
 ictice, be allowed by the Court, in the first instance, without formal proof,
 id there is much which belongs to a dubious and arguable region as to which
 ourt may or may not proceed in this manner *Thayer's Ec. Ev. 277*

In another case proof by evidence may be dispensed with, namely, where
 opponent by a solemn *in facie judicial* admission has waived dispute. This
 known as Judicial Admission *Wigmore § 2663.*

Facts which need not be proved. *Stephen* in his Digest of the Law of
 idence (1st and 2nd editions,) Chap. VII originally dealt with "judicial
 tices" under the general head of 'Proof' and the special head of 'Facts
 hich need not be proved,' as in this Act 1 of this he was taken to task by
 acute critic (in 20 *Solicitors' Journal*, 937) who suggested that since *Stephen's*

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 case" that whoever desires a judgment
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 not exist," and since art. 59
 bout judicial notice) declares that some facts asserted by a party need not be

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office, of consciously recalling to the mind a fact known, but not for the moment
 erted to, is an act of precisely the same kind as listening to the evidence of a

tel to the Judge's inspection in Court. But the true conception of what is

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Thayer *Ev* pp 278-280

Principle. Judicial notice is based upon very obvious reasons of convenience and expediency; and the wisdom of dispensing with proof of matters

tion. There is, however no rule of any practical importance which governs
arises must be decided
precedents, than the
words of *Greenleaf*,
"Courts will generally take notice of whatever ought to be generally known
within the limits of their jurisdiction" *Green* *Ev* § 8; *Burr* *Jones* § 105 (a)
"Courts will not pretend to be more ignorant than the rest of mankind" *Fisher*
v. Jamson, 30 Ill. App 91.

(2) all public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed :

(3) Articles of War for Her Majesty's Army, "Navy or air force" :•

(4) the course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act,† or any other law for the time being relating thereto.

Explanation.—The word "Parliament" in clauses (2) and (4) includes—

(1) the Parliament of the United Kingdom of Great Britain and Ireland ;

(2) the Parliament of Great Britain ;

(3) the Parliament of England ;

(4) the Parliament of Scotland ; and

(5) the Parliament of Ireland :

(5) the accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland :

(6) all seals of which English Courts take judicial notice : the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General‡ or any Local Government in Council : the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India :

(7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the Gazette of India or in the official Gazette of any Local Government :

(8) the existence, title and national flag of every State or Sovereign recognized by the British Crown :

(9) the divisions of time, the geographical divisions of the world, and public festivals, fasts, and holidays notified in the official Gazette :

(10) the territories under the dominion of the British Crown :

(11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons :

*Substituted by Act X of 1887.

†24 & 25 Vict. c. 67.

‡For lists of such Courts, see the notifications printed on pp. 372 to 374 of the Western India Volume of Macpherson's Lists of British Enactments in force in Indian States

7. (12) the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it :

(13) the rule of the road * [on land or at sea]. In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so

Whether the list is complete. A similar list is also given by Sir J. M. Fitzjames Stephen in art. 55 of his Digest of the Law of Evidence. As regards that list he remarks "The list of matters judicially noticed in this article is not intended to be quite complete. It is compiled from 1 Ph. Ev. 455-67 and T. E. ss 1-20, where the subject is gone into more minutely."

the ordinary course of nature the meaning of English words, and all other matters which they are directed by any Act to notice, such as, in Bengal, lists of land holders who have not made road-tax returns (Ben. Act IX of 1833 = 194

cases that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment; resting on the maxim, *expressio unius est exclusio alterius*. But these cases. The only inference which a Court can draw from such provisions (which generally find a place in local enactments) and idle doubts) is that the Legislature was either ignorant or unmindful of the

* These words in section 57, para. (13), were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s. 5.

real state of the law, or that it acted under the influence of excessive caution and if the law be different from what the Legislature supposed it to be the implication arising from the statute, it has been said, cannot operate as a negation of its existence; any legislation founded on such a mistake has not the effect of making that law which the Legislature erroneously assumed it to be so. *Virucll*, 548. Similarly in *Kron's Admiralty v. Adams* 11 Ab. 73 Ind. Cir. 312 at p. 316—A. I. R. 1923 Cal. 66, *Mr. Justice MacKerzie* said: "The only inference which a Court can draw from such superfluous provisions (which often find place in Acts to meet unfounded objections and ill-dubias), is that the Legislature was either ignorant or unmindful of the real state of the law or that it acted

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shall take judicial notice. In the circumstances the proper meaning of the section is that it does not forbid the Court to take judicial notice of any fact which is a proper subject of taking such notice, but the Court must take judicial notice of the facts mentioned in this section and as regards that the Court is not at liberty to exercise any discretion. It was pointed out with regard to the corresponding section of Act II of 1875 that the list mentioned therein was not exhaustive and the Court was at liberty to take judicial notice of any fact of which English Courts take judicial notice. *Queen v. Nabalup (a suami)*, 1 B. L. O. Cr. 27-5, *Wells v. Wells* 11 L. 169. But why should it be confined to facts of which the English Courts ordinarily take judicial notice? The maxim that what is known need not be proved *manifesta (or notoria) non indigent probatione*, may be traced far back in the civil and canon law, indeed it is coeval with the legal procedure itself. We find it a maxim in English law

res judicata, si notum non sit in forma judicii. Per Coke C. J. in Cranford v.

future possibility of the doctrine of judicial notice. Courts may judicially notice much which they cannot be required to notice. That is well worth emphasizing, for it points to a great possible usefulness in this doctrine, in helping to shorten and simplify trials. It is an instrument of great efficacy, in the hands of a competent Judge, and it is not nearly as much used, in the region of practice and evidence, as

daily to smother trials
Thayer Proc. Treat. L. v. 30

by Judges? One reason is that they apparently forget that (as *Professor Thayer* says) they might notice much that they cannot be required to notice by general rule made in advance, e. g., a rule requiring them to notice always the incumbency of a sheriff a office might go too far, but they may in a given case be justified in declaring a specific sheriff to be notorious; and so on, in a thousand

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7. notice given to this branch of the subject is, that diversity of opinion has existed as to whether certain laws of a private nature were entitled to the judicial notice, and it has therefore become the task of the legal chronicler to mark them. The law of the jurisdiction is peculiarly a matter of judicial cognizance. It is only on the presumption that the law is known to the Court that there can be any proceedings whatever in Courts of Justice. *Burr Jones* § 11? The Mahomedan ecclesiastical law is a law having the force of law in British India, and as such will be taken judicial notice of by Courts. *Whitley Stokes* Vol II p 887, *Queen Empress v Ram an* 7 A 161. The general rules of Hindu and Mahomedan law do not require proof. They can be ascertained by making necessary reference to authoritative text books, judicial decisions as well as from the opinions of the Pandits or Mullahs. *Bhagwan v Bhagwan*, *supra*. The Court can take judicial notice of what the Hindu Law is with regard to Hindu custom, that always must be proved. *Per Garth C J in Jagjit Mohini v Dhananath*, 8 C 582 (587). But where a custom is judicially recognised it need not be proved. *Ham v Amin* *lar of Patapur*, 23 C 101, 93 Ind Crs 321, 78 Ind Crs 101, 1 R 19-6 Oudh 352, etc also.

Pamalinga, 12 M I A

customs of any particular community may acquire, by being repeatedly proved in the Court, such a status as to make it unnecessary in any subsequent case for

to prove the existence of a body of customs. Assuming that a rule of *Majaratana* has the term of s 57 of the Evidence Act operation of customs which necessarily enacted by the Legislature, Courts have to take judicial notice not only of the effect of the rules but also of those facts which are necessary for showing that

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taken notice of as such, and as the contrary be expressly provided and declared by such Act." This provision is now repealed by the Interpretation Act, 1889, 52 and 53 Vict. C. 63, which provides, by s. 3, that every Act passed after 1850 "shall be a Public Act and shall be judicially noticed as such, unless the contrary be expressly provided by the Act." So now every personal Act or local Act should also be taken judicial notice of by the Indian Courts.

Clause III. The Court will recognize without proof the Articles of War, whether in the naval, the marine, or the land service, as well as the auxiliary forces,—that is the militia, yeomanry, and the volunteers,—and also the marine force, (*Taylor* § 5), but not of a book called the Rules and Regulations for the Government of the Army (*Boyle v. Arthur*, 1 B. & C. 300) nor the Regulations of the territorial force (*Fulton v. Anderson*, [1912] 1 C. 1 107).

Clause IV. The English Courts take judicial notice of the laws of England and Ireland, including the laws and custom of Parliament and the privileges and course of proceedings of each House of Parliament (*Stockdale v. Hansard*, 9 A. & E. 1—2 P. & D. 1, *Lea v. Leary*, 60 C. 12 Q. B. D. 271). The Indian Courts should take judicial notice of decisions of Parliament. *The Englishman v. Lloyd* [1811] 3 C. 700—14 C. W. N. 713. The proceedings of the Legislature" says Prof. Hargrave as shown in its journal are by some Courts noticed, but this is an artificial theory on principle, the proceedings as contained in the

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of the sovereign
angle, 2 M. & Rob.
1 and all matters
stated under it. *R. v. Gully*, 1 L. 1 93, *Wheeler v. Sutton of Shore*, (1891) 1 Q. B. 119.

Clause VI. The English Courts take judicial notice of the Great Privy Seal (*Lord Melville's Case*, 29 How. St. Tr. 707; royal proclamation, of the signature of the clerk, *Levinstein*, 1 R. P. C. 170), seal of the Corp

Crown Office Act, 1877, the Seal and the Privy Seal of the Duchy of Lancaster, the Seal and the Privy seal of the Duchy of Cornwall, the Seals of the old Superior Courts of Justice, and of the Supreme Court and its several divisions; the old office of the P^rince of Wales, the Seals of Courts constituted by Act of Parliament, if Seals are

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nd of its district
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ency in
Ireland, which since the 6th of August, 1877, has been called "The Court of Bankruptcy in Ireland, of the several in Ireland, of the Landed Estate C of that Court, and of the county Court the city of Glasgow is not one of judicial notice. *In re Henderson*, 22 C. 491. Where the seal is not distinctly

formation cannot without proof be recognized as such by the judicial tribunals of other nations until it has been acknowledged by the sovereign power under which those tribunals are constituted (*City of Lyons v. Bank of*

belonging to the executive
to such acknowledgment
is a fact by other competent
testimony, and the existence of such unacknowledged government or state may, in like manner be proved, the rule being, that if a body of persons assemble together to protect the welfare, and support their own independence, make laws and have Courts of justice, this is evidence of their being a state (*General P. v. 1* citing *Yusuf v. General* 2 C & P 224. But the rule in *T. S. v. Palmer*, 3 Wheat 610, 631, seems limited to the case of a defendant denying private intent by pleading the authority of a government having colourable existence and engaged in a rebellion. On the general question, the correct rule seems to be the contrary of the statement in *General P.* and a court will look solely to the action of the Executive where the existence of a foreign nation or government is involved (*T. S. v. Hume* 2 Wheat 611, 631; *L. v. Hume* 4 Cranch 211; *Gibson v. H.* 1 Wheat 243; *America v. Junco* 6 Cr 193; *Hall v. S. Jun* 6 Cr 11; *P. v. 1*; *Kenney v. Chambers* 18 How 58 61; *Wheeler v. Sultan of Johore*, (1834) 1 Q. B. 11). In the last mentioned case *King L. J.* said at p. 161: "The status of a foreign sovereign is a matter of which the Courts of this country take judicial cognizance—this is not a matter which the Courts either assume to know or to have the means of knowing, without a continuous inquiry as to whether the person cited is or is not in the position of an independent sovereign. Of course the Court will take the best means of informing itself on the subject if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany. Here the person cited was the Sultan of Johore, and the means which the Judge took of informing himself as to his status was by inquiry at the colonial office." Later on the learned Judge said: "The next point is this: It is his right to immunity, and may be . . . agree, but how is this to be done . . . clear supposing, by way of illustration, that some well known potentate, such as one of the great European Emperors, were to be sued in a Court of this country, and took no kind of notice of the proceeding; it would be the duty of

in Council. See also *Lachmi Narain v. Protop*, 2 A. 1 (17), *Puocani v. Bombay Baroda*, 9 B. 241.

While the Courts will take judicial notice of this existence of foreign governments, the rule must be taken with the qualification that it relates only to such governments as have been recognized by the Home Government. The Courts will not anticipate the action of the government in this respect, and in case of a rebellion or a revolt in a foreign state, they will consider the former state of things as existing until the proper department of the government recognizes the change (*City of Berne v. Baul*, 9 Ves 347; *Taylor v. Barclay*, 2 Sim 213. Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government

57. legible, Courts will not take judicial notice of it *Jaker Ah v Ruj Chandra* 10 C L R 169 A registered power of attorney was admitted under this section without proof, the Registering *Bion* 1, 11 C 176 But the abo

Courts can take judicial notice of *Rath Mohun v Angerlas*
Aath, 105 Ind Cas 422

Clause VII Courts will judicially recognize the political constitution or frame of their own Government; its essential political agents and public office sharing in its regular administration; and its essential and regular political operations, powers and actions Thus, notice is taken, by all tribunals of the accession of the Chief Executive of the nation or state, under whose authority they act; his powers and privileges (*Elderton's Case*, 2 Ld Raym 950), a d

Gule's Ex'r, 4 Marten 600
 , and principal officers of
 .31) In America the Court
 . senator the appointment,
 ell, 2 Rob (L) 166) is
Holman v Burrou, 2 Ld

be taken judicial notice
 of deputies *Great Ex*
 l executive officers to ad
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English doctrine does not extend to this length

be taken of the signature of a Deputy Commr of Police *Waltchar v* 10 C L R 53 C 718=30 C W N. 713; see also *Tamor v Kaludas*, 4 B L R 0
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he is acting as such *Rampjan v Ahmed*, 5 Ind. Cas 537.

being alike members of the great family
 d to recognize each other's existence and
 the usual and appropriate symbols of
 rationality and sovereignty are the national flag and seal Every sovereign
 therefore, recognizes, and, of course, the public tribunals and functionaries of
 sovereigns
 ls of state
 occurred as
 , however
 upon a civil war in any country, one part of the nation shall separate itself
 from the other, and establish for itself an independent government, the newly

public fairs and festivals. *Tyler* 3 :
 facts in the case of the *Wright*
 the fact itself; he merely knows wh
 the period of limitation for a suit expires on a gazetted holiday and the plaint is
 presented on the day the Court opens it is not necessary for the plaintiff explicitly
 to state that on the day on which the period of limitation expired the Court was
 closed. *Tel. C. Ind. v. M. P. S.* 16 N. L. R. 193-7, Ind. Cas. 926. This clause
 empowers the Court to take judicial notice of any public holidays notified in
 the official gazette. *Id.*

Geographical Division. Courts in
 physical features of the country covered
 the country as a whole, and of the entire
 Courts take judicial notice of political subdivisions of the country as it was made
 by law, and of the state or territory where they hold their sessions, and of the
 judicial districts within it. Courts will take judicial notice of the local divisions
 of the state into counties, cities and towns and of the facts that certain cities are
 in such subdivisions. *S. v. Pennington* 124 Mo. 483, *Rogers v. City* 104
 Cal. 283 (1m). *Debate Case* 1 B. & A. 243, *R. v. F. L.* 15 Q. B. D. 827, *R. v.*
St. Maurice 16 Q. B. D. 914. The Court takes judicial notice of the existence,
 extent, and geographical position of the British dominions and of the territory
 of the foreign States. *Halsbury*, Vol. 13, p. 493. In *Cooke v. Wilson*, 1 C. B.
 N. S. 153, *Crowder J.* at p. 161, held that the Court was bound to take notice of
 the existence of the colony of Victoria and *Cresswell J.* at p. 163, that it must
 recognize that the colony was out of England. In *Thurrell v. Dryer*, (1884) 9.
 App. Cas. 41, where the question was whether the words "St. Lawrence" in a
 policy of confined
 to the river that the
 Court should names
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cognizance of the fact that, assuming these tribes to be independent, they do
 not possess jurisdiction over certain territories. This is a matter which appears
 to me must necessarily be within the cognizance of Her Majesty, because, for
 the protection of her hegemony in the ordinary way, she should know whether
 redress should be applied for to the Sultan of Morocco or to the head of the
 various independent tribes of Soudan. Sound policy appears to me to require

at p. 221 said "The judgment proceeded, not on the question whether
 the Court should give relief or not, or give discovery or not, and with-
 hold relief, but upon the question whether the King's Court should attend to
 the case
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Case, 1821, 4 B & All 243, per Bayley J and Best J) unless such situation is recognised by statute (*R v Holborn Union Guardian*, 6 L & B 715) nor of the particular diocese within which any town is situated (*R v Symson*, 2 L & Raym 1379, *Halsbury* Vol 13 p 1). It is judicial notice that in certain cities referred to in the pleadings do not exist. *Wheeler*, 162 Mass 129 (1867) In

state, without proof of the fact. *Strong*, 42 Ill 148. But in an action for notice of the fact that *Helchester*

was in the county of Somerset *R v Burrage*, 3 P Wms 139 196, see also *Thorne v Jolson*, (1846) 3 C B 661, *Brunne v Thomson*, (1842) 2 Q B 754, *Humphreys v Buld* (1841) 9 Dowd 1000, *Church v Imp Gas Co*, 7 L J Q B 118. In England the Courts will take judicial notice of the different counties palatine, and counties corporate in that country. *R v S Maurice*, 16 Q B D 993, *Devil's Case*, 1 B & A 218. That a particular colony or place in it, is not, in England need not be proved to an English Court. *Cool v Wilson*, 26 L J C P 14. The Courts take judicial notice of the leading geographical features of the country, for example the existence and general location of im-

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and in *R v Isle of I*

sion of a county

Ald 301 the Court

named Dublin in the world, and therefore refused to construe an allegation in the declaration that a bill was drawn in Dublin as meaning drawn in Dublin in Ireland. *Ibid*, see also *Kearney v King*, 2 B & Ald 301. But a statement by the Attorney General on the Instructions of the Home Secretary, as to whether a certain spot in the British channel was within the limits of H M territorial sovereignty was held binding upon the Court (*The Fargurness* [1927] p 311, of *Engelle v Mursman* [1928] A C 433). *Phip Ev 7th Ed 22*. Judges are aware, with the rest of the community, of the existence of the principal lines of railroad which are wholly or in part within the county. The common knowledge includes locality, course and direction of such a railroad. What places are on the line of a railroad, have stations in it, or constitute its termini, or railroad centres, through what other localities it must pass in order to connect two places, what is the distance between two points on a railroad, within what county these points are, and similar facts pertaining to judicially know. But details, to be proved. *Ev § 741*

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Clause X "All Courts of Justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the Government whose laws they administer, or if its recognition or denial of the sovereignty of a foreign power as appearing from the public Acts of the legislature and executive although those Acts are not formally put in evidence nor in accord with the pleadings" *Jones v United States*, 137 U S 214 (Am). In England the Courts take notice of the territorial extent of the jurisdiction and sovereignty exercised de facto by their own government and the local divisions of the country as parishes, and the like so far as the boundaries further than they may be. The Foreign Jurisdiction Act, 1890 any question as to the existence or extent of a foreign country, arising in proceedings in a Court in the British dominions or held under British authority, is to be submitted to the Secretary of State, whose decisions for the purpose of the proceedings is final. "If it be true" said Lord Selborne in *Daniodhar v Deoram*, 1 B 367 at p 404 (P C) "that the Indian Courts might take judicial notice of the territories of the Queen in India, then, if there has been a cession of terri-

try, they must take notice of that, and they must do so independently of the Gazette, which is not part of the case, but only evidence of it."

Clause XI. The Courts take judicial notice of wars with foreign states if a state of war has been declared by the proper authorities. *Dyer v Lord Harman*, 111 N. 202. It is established that the law is as stated in the text, although Lord Esher said during argument, "You would be obliged upon an indictment for a libel to prove that France is now at war with Austria, not as to the war with this country, the Court taking judicial notice of that with reference to our own country." See also *Hill v Lord Harman*, 111 N. 203, *Per v De Boreer*, *Thellus v Caring* 1 Ex. 20, *Hart v Murray*, 11 June March 5, 1908, *A judgment of 1911* (1915) 3 K B 613 C5, *Re Lane*, (1916) 1 K B 268 T1, *Re* § 18. But if no judicial notice has been made the fact of a state of war is one to be proved. *Hill v Lord Harman*, 111 N. 203. A war between foreign powers is not judicially noticed. *Dyer v Lord Harman*, 111 N. 203. When it is said, however, that the Courts take judicial notice of wars with foreign states, it must be interpreted that the Courts take judicial notice of the act of their own executive with reference to war with a foreign state. The executive recognition is the warrant for the Court. *See v H. Wheat* (1883) 246. It is the determination of a political question by another department of the government which is binding on the Judge. *Jones v United States* 157 U. S. 213 (1901), *Harr Jones* § 107 (a). As regards the commencement of hostilities see *The Fenelon Duncan v Kiser*, 8 M. & P. C. 181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-1043-1044-1045-1046-1047-1048-1049-1050-1051-1052-1053-1054-1055-1056-1057-1058-1059-1060-1061-1062-1063-1064-1065-1066-1067-1068-1069-1070-1071-1072-1073-1074-1075-1076-1077-1078-1079-1080-1081-1082-1083-1084-1085-1086-1087-1088-1089-1090-1091-1092-1093-1094-1095-1096-1097-1098-1099-1100-1101-1102-1103-1104-1105-1106-1107-1108-1109-1110-1111-1112-1113-1114-1115-1116-1117-1118-1119-1120-1121-1122-1123-1124-1125-1126-1127-1128-1129-1130-1131-1132-1133-1134-1135-1136-1137-1138-1139-1140-1141-1142-1143-1144-1145-1146-1147-1148-1149-1150-1151-1152-1153-1154-1155-1156-1157-1158-1159-1160-1161-1162-1163-1164-1165-1166-1167-1168-1169-1170-1171-1172-1173-1174-1175-1176-1177-1178-1179-1180-1181-1182-1183-1184-1185-1186-1187-1188-1189-1190-1191-1192-1193-1194-1195-1196-1197-1198-1199-1200-1201-1202-1203-1204-1205-1206-1207-1208-1209-1210-1211-1212-1213-1214-1215-1216-1217-1218-1219-1220-1221-1222-1223-1224-1225-1226-1227-1228-1229-1230-1231-1232-1233-1234-1235-1236-1237-1238-1239-1240-1241-1242-1243-1244-1245-1246-1247-1248-1249-1250-1251-1252-1253-1254-1255-1256-1257-1258-1259-1260-1261-1262-1263-1264-1265-1266-1267-1268-1269-1270-1271-1272-1273-1274-1275-1276-1277-1278-1279-1280-1281-1282-1283-1284-1285-1286-1287-1288-1289-1290-1291-1292-1293-1294-1295-1296-1297-1298-1299-1300-1301-1302-1303-1304-1305-1306-1307-1308-1309-1310-1311-1312-1313-1314-1315-1316-1317-1318-1319-1320-1321-1322-1323-1324-1325-1326-1327-1328-1329-1330-1331-1332-1333-1334-1335-1336-1337-1338-1339-1340-1341-1342-1343-1344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"law of the road," was not to be considered as inflexible, since, in crowded streets situations and circumstances might frequently arise, where a deviation from what is called the law of the road, would not only be justifiable, but absolutely necessary. Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horse back, without any reason crossed over to the side on which the defendant was driving, and on endeavouring to pass, his horse was killed. Lord

the plaintiff
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of the road,
if he kept to
■ 719 As

regards rules of road, vide *Leame v Bray*, 3 Er & 93, *Turley v Thomas* 8 C & P 104

The Court will take judicial notice of the following rules with respect to navigation,—first, that ships and steamboats, on meeting "end on or nearly end on, in such a manner as to involve risk of collision" should port their

In all cases and also on all matters of public history etc Notorious facts of foreign history will be noticed, whether ancient or contemporaneous. The existence of a war in a foreign country, at a given time, will be regarded as a fact of common knowledge. But special historical facts of comparatively slight general importance connected with a particular state and the consequences regarded as commonly known. D

importance will be considered in determining what facts of foreign history minor. Any Court of a nation will know as matters of common knowledge notorious facts in the nation's history. Where these are a direct result of legal action the knowledge of the Court may also be judicial,—as in the case of

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state, what was the tenure of office of the succession, chief magistrates of state, the date of a general or national election need not be established by evidence. *Ibid* § 793. The general history of the great-national parties is a fact of common knowledge. *Ibid* § 799. When in doubt as to any matter to be judicially noticed the Judge may refer for information to appropriate sources. *Philp Ev 4th Ed* § 17. *Taylor Ev 10th Ed* § 21. The Judge may resort to such means of reference as may be at hand, and as he may deem worthy of confidence. *Green Ev* § 295, *Tay Ev* § 21. The provision that the Court may resort for its aid to appropriate books is in advance on the English Law under which though an expert called as a witness, will be allowed to refresh his memory by referring to a professional treatise regarded by him as of authority yet it but see *Willot*

judicial cogniz
of some matter for his Court's knowledge and notice must frequently demand upon him, to which, without some means of reference—or refreshing his memory by referring to a professional treatise regarded by him as of authority yet it but see *Willot*

ration concerning matters which have not been referred to in the evidence, in which he is not bound to resort to any source of information which in its nature is calculated to be trustworthy and helpful, always seeking first for that which is most satisfactory; and in cases too concerning matters of law, and in other cases he may use all proper means for satisfying himself in any way that appears to him most likely. *For Jones* § 132. In a New York case the opinion shows that the Court had referred to various documents and to Pollard's and Greenly's histories of the Civil War. *Sumner v. Churches* 112 C., 37 N. Y. 174. In the celebrated *Dickens* case *Cut v. Justice* evidently had

light upon the social and political

Sanford 11 How. (U. S.) 333, *For Jones* § 132. Dr. Wilson illustrates the principle thus: "The Judge may consult works on collateral science or arts, touching the topic at hand. He may draw for instance, on mythology, in order to determine the meaning of similes in an ambiguous writing. He may refer to almanacs (*Pigeon v. Fox*, 10 Cr. 112 227), he may appeal to his own memory for the meaning of a word in the vernacular (*For v. Wood* 11 Moo. C. C. 323, *Croft v. Gilling* 2 Camp 25, *Mundy v. El* L. R. 71 x 70); he may, as to the meaning of Latin, refer to dictionaries of science of all classes (*For v. Gilling*, 6 C. & P. 186, *Pier v. Lee* 1 Leon 242, *Atten v. Drummond* 1 C. & L. 210, *Sutton v. Hutton* 9 C. & L. 25; *Bunter v. Atque* 8 Kn. 11; *In re St. Catherine Hospital* 1 Vent. 11). *Stinner v. Proctor* 1 L. R. 281; *Croft v. Gilling* 2 Camp 25. He may determine the meaning of the abbreviations of Christian names and others, and of other common terms, as to a point of

he may consult

& E. 650), and *Lord*

viyancer as to a rule of
R. 772" *Wharton* F. 111. . . .
is called upon to decide as to what particular date in the English calendar a certain date in the Jewish year corresponds with, may resort for its aid to appropriate books or documents of reference, and in such a case an almanac containing the British and Jewish calendars may be referred to. *Qudl* Judicial calendar was not compiled expressly for the purpose of showing corresponding dates in the different era, and was not an appropriate document of reference in such a case. *Raghobar v. Sheo Chm* 10 C. 152. In all those and the like cases where the memory of the Judge is at fault, he resorts to such documents or other means of reference as may be at hand, and may deem worthy of confidence

of war which were not produced. Cited by *Butler J* in *R v. Holt*, 5 F. R. 416. But in many other cases, the English Courts have themselves made the necessary inquiries, and that, too, without strictly confining their researches to the time of the trial. *Taylor* § 21, *Taylor v. Harla* 2 Sim. 231; *The Charkiel* 42 L. J. Adm. 17 cited in *Lachin v. Naran v. Hyslop* 2 A. 17, *Chandler v. Grievs*, 2 H. B. 106 n. *For v. Holt* 1 M. & Cr. 64, *Worsley v. Fisher*, 2 2 Roll follow
v. *For*
Lachin.

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"from producing evidence, it
make a request for it. Up
said to declare the fact noticed, or at least to make the investigation which it

7. deems necessary No doubt, in most instances, the rule of law has the plain consequence of compelling the Judge to declare the dispensation, not to do so would be to err, precisely as under any other rule of law. But it must not be supposed that this is universal numerous topics, near the line.

Court may but not must, take

nized,

notice

of the

Cas 114. In a suit for declaration that a church and its properties were trusts and the plaintiffs were its trustees and for possession of the same from defendants certain documents consisting of printed letters of the Priests of the

dated about 75 years ago were ad of reference to prove the history of Catholic Mission Bell, that, though

the books were admissible to prove facts of public history, they could not be relied upon to prove where certain particular Missionaries were living or when they died. The Court can dispense with evidence only of what may be regarded as notorious facts of public history. *Ambalam v J M Barthe* (1912) 11 W N 152=13 Ind Cas 99. A document may be referred to in connection with ancient facts of a public nature provided it is an approved, public and general history. It is provided by this section:

literature science or art the Court may res

books of reference. *Lira Chammamal v*

the question whether a certain property was a matter of public history within the meaning of this section, and historical works cannot be referred to for the purpose of deciding the question. *Sant Singh v Rulla Ram*, 126 Ind Cas 744= A I R 1930 Lah 738. "It is to be observed that the section does not say how

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before the suit in which the usage of the institution and its history are described, both being matters relevant to the suit. *Augustine v Medico* 15 M 241. Evidence of the sources of common knowledge, if not its extent may perhaps be obtained by reference to a cyclopædia and the list of text books to be found but detailed information supplied from such sources requires usually to be supplied by experts. *United States v St Albans*, 131 Ind Cas 771=A I R 1931 P. C 189

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If so,

presently in s 49 But none of the principle

on which the matters of science sections. When the Court has

art, the opinion upon that point

art are relevant facts under s 45

the rule in regard to the admission of expert testimony is thus stated by *Laurie v* "It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of inquiry and may better comprehend and appreciate it, than the jury, but to warrant its introduction, the subject of inquiry must be one relating to some trade, profession, science or art in which persons instructe

more skill and

generally to have

witnesses, and by

between the parties

such a nature that

reference to them, and draw inferences from them, as witnesses, then there is

occasion
 require
 be mut
 known,
 cations, will be judicially noticed, but they must be of such universal notoriety
 and so generally understood that they may be regarded as forming part of the
 common knowledge of every person *Hurr Jones* § 123 So Mr. Justice Mirkby
 is not correct in his interpretation of this section when he says "What
 perhaps it meant is that, though the parties must obey the law as laid down
 in ss. 45 and 60, the Judge may resort for his own aid to appropriate books
 without restriction." This principle of the
 rule contained in this section The Corporation
 of Calcutta, 22 C. W. N. 745. is Court by the
 prosecution in support of As regards the
 admissibility of these bo these books
 I see that one or mo Magistrate's
 Court. In my opinion del thereby
 to make these books and all their contents evidence in the case. The use
 of such books by the Court is regulated by sections 57 and 60 of the Evidence
 Act
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uence may be referred to *Hatum v Empress*, 12 C L R 86 A Court, *suo motu*,
 will know whatever every one, as a rule knows about the characteristic proper-
 ties of material substances, in solid, liqui
 Regarding solids, the Court will notice
 familiar,—as that certain substances are
 the movements of gases The Court w
 dynamite are dangerous by reason of their liability to create an explosion So
 also no proof need be offered of the well known qualities of common forms of
 matter in a liquid state
 specified conditions, to exj
 conducted in pipes, and
 should bring out the expl
 knowledge *Chamberlayne*
 established and notoriou
 tribunal The conclusions of such inve
 regarding matters of general interest, are c
 tions of scientific knowledge, about which
 opinion, must be proved, if their truth is ■
 layne's Ev § 720 The scientific prin

OF SOLID COM IN SCIENCE
 mechanical occupations, these and similar facts, so far as popularly known, will
 be known by the Court upon ordinary principles *Chamberlayne's Ev* § 765.

7. **Facts of Social life** No proof need be offered of facts which are well known incidents of the social life of the community. "*Quicquid agant homines*" said Lord Mansfield, "is the business of Courts, and as usages of society alter, the law must adapt itself to the various situations of mankind." *Barrell v Brooks*, 3 Dougl 371, 373. "It is the duty of Courts judiciously to know what is the general course of the transactions of human life." *Duncan v Little*, 2 Bibb (Ky.) 424, 426; *Chamberlayne v El* § 755

Private Knowledge of the Judge In deciding a case a Judge cannot bring his judgment on his own personal knowledge. *Durga Prasad v Ram Doyal*, 38 C 153. There is a real but elusive line between the Judge's personal knowledge as a private man and his knowledge as a Judge. The latter does not necessarily include the former, as a Judge indeed, he may have to ignore what he knows as a man, and contrariwise. *Wignore* § 2569; *Chamberlayne v El* § 574. That rule was laid down so far back as the year 1406. In arguing a question as to the duty of the Court not to have rendered a certain judgment, counsel put this case: "Sir let us put the case that one man kills another in your presence, guilty is indicted before you and is

report to the King, to give him this case, before causing those to appear by whose hands the King was paid. *Gascoigne C J* said: "Once the King himself asked of me the very case that you have put, and asked me what was the law, and I told him just as you say it, and he was well pleased that the law was so." Year Book, 7 H IV, 41, pl 6 cited in *Wignore Cas* 751, *Wignore* § 2569, *Patridge v Strange*, Plowd 83; *Marriot v Pascal*, 1 Leon 159, 161. But *Mr Haules*, Solicitor General arguing said: "It is said, though a Judge do think in his conscience a person

at the
behavior, and the person
the truth of such incidents is contested between the parties, he should mention

his private knowledge of such incidents to the parties and he should refuse to be the judge in that case unless both the parties, after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge." See also *Hurjuchal v. Shro Dast*, 3 I. A. 259-26 W R 55 P C. Similarly where a case is to be tried by jurors, "the personal knowledge of any juror concerning any probative fact involved in the case under consideration is not to be considered in deciding the case. Such a juror should communicate his information to the Court, and if he is not excused from service and it is deemed proper to his cognizance of such a fact in the trial, he must be sworn as a witness and examined, subject to

But any experience knowledge good prove

fatal. It is common knowledge, also, that a forest tree cut nearly in two at the butt will fall, if a high wind blows against it. If a witness should testify to the contrary to these ordinary phenomena, the common knowledge of the juror derived from his experience in such matters would naturally compel him to discredit that witness. Many illustrations might be given where men are normally and legitimately influenced in considering testimony by their general knowledge and experience. It is utterly impracticable in the administration

of Courts of justice to secure a juror whose mind is totally blank as to questions involved in the ordinary transactions of life. Issues of fact cannot, in the nature of things be divested of general knowledge of practical affairs. The Court cannot do otherwise than to direct them to use such experiences as are common to all men in the decision of questions of fact. It is part of the jury system which cannot be dispensed with." *Per Burnett C J in Rustad v Portland R L & P. Co*, 101 Or. 669 (Am), 11 *Amore* § 2570

judicial notice is standard *O'Donnell*, Ald 303), 1001, L. R.

3 Q B 197); *Phip Ev 7th Ed* 25. So a Court will take judicial notice of matters of universal notoriety as general knowledge of daily life. But a Judge cannot use from the Bench under the guise of judicial knowledge that which he knows only as an individual observer. He cannot therefore impart into a case his knowledge of the previous conduct of the accused. *Shamburam v Emperor*, 25 S L R 213-132 Ind C 18 176. It would be unfair to the Railway Company to take judicial notice of thefts on the

Lal, 111 Ind C 18 523-A I R. judicial notice of the fact that there is between the arrival of a registered letter from the Post Office or in other words that a registered letter takes 24 hours longer than an ordinary letter. *Firm of Chaterbhuy v Secretary of State*, 99 Ind Cas 622-A I R 1927 All 215. So also judicial notice can be taken of the course of post, the stamp of post-offices on letters, and the fact that post cards are un

them, and *Huth v Hut* repeatedly *Sano v Pun* community be taken ju 186-A I 2 O W N Courts are

Bux 93 Ind Cas 333-A I R 1926 Oudh 352 Courts must take judicial notice of provisions of s 24, Paper Currency Act, without defendant having raised the objection in his defence at all. *Mirza Hidayat v Nga Kyang*, U R R. (1914) 1st Qr 13-24 Ind Cas 721. A registered power of attorney was admitted under s 57 of the Evidence Act without proof as the registering officer is a Court under s 3 of the Act. *Kristo Nath v T F Brown*, 14 C. 176. In *E-*

7. judicial :

*Doms v**Universit*

8 E & B

domestic animals *Aye v Niblett*, (1918)

have also noticed judicially that boys a

Hardwick 32 T L R 159 H L ; *Williams v**Smith*, 17 T L R 235, 423 ; *Sullivan v**Dublin Co*, 39 Tr L T R 126 ; *Phip Ev 7th Ed* p. 25.

Judicial notice of facts transpiring in Court. A Court can take judicial notice of facts transpiring in Court. *Chattira Kumari v. Mohan Bihari*, 121 Ind. Cas. 337 = 1931 Pat 114

§ 2567. Since judicial notice is an expedient for hastening the trial and elimina-

Books referred to by Courts. The following are some of the books which the Courts often resorted to in order to ascertain the matters of history, literature, science, art, etc. —

(1) Directions for Revenue Officers in the North Western Provinces, promulgated by the Lieutenant Governor and prepared probably by Mr. Thompson. *Id.* Rul 29

1 (17)
Forester
Ajmodin

17 B 448

(7) *Buchanan's Journey in Mysore, Ibid* pp 56, 57(8) *Todd's Rajasthan, Ibid* pp. 56, 57 ; *Moharana v Vadial*, 20 B. 61 (72)

(9)

(10)

(11)

(12)

(13)

(14)

(15)

Ibid 29 (82)

Framji Nanabhai,
443 (444) ; *Ranga-*

7 B H

*sams v*2
rr, 12 B H C. R.

(16)

199 (207)

Roman Law. *Jalindra Mohun v Ganendra*: Dictionary *Hormasji v. Poddar*, 12 B H

C R 199 (207).

(20) *Domat*, 2413 *Jalindra v Ganendra, supra*.(21) Mr. Prinsep's Table *Forester v. Secretary of State*, 18 W. R 359 (364).(22) *Seaton's letter. Ibid.*

(23) Histories, firmans, treatises, and even replies from Foreign office. The *Charkish*, L R 4 A. & E. 59 ; *Phip. Ev 4th Ed* p 17 ; cited in *Lachmi Narain v Ragh Partap*, 2 A-1 (17)

(21) The collection of treatises originally published by Mr Atchison, the Secretary to the Government of India. *Lachmi Narain v. Raja Partap*, 2 A. 1 (17)

(25) Atchison's Treatises. *Lachmi Narain v. Raja Partap*, 2 A. 1 (15).

(26) New Oxford Dictionary. *Dalalhai v. Jimselst*, 21 B. 291.

(27) The work of Grotius, Vattel, Puffendorf, Chalmers, Wheaton, Phillimore and Twiss. *Damodar v. Deoram*, 1 B 367 (P. C); *Lachminarain v. Raja Partap*, 2 A. 1 (23).

(28) Lord Palmerston's speech in the debate on the relinquishment by the British of *India v. Gordon*, 1 B 350.
House of Lords on the

P 357

Munro. *Yenkalalanara-*

sinha v. Dandannu, 20 M. 302

(32) Dewan Bahadur Srinivasa Ayyanger's "Progress in the Madras Presidency" *Ibid*

(33) Richardson's Manuk. *Mathen Shuc v Maung Kan Gye*, U. B R. (1897-1900) Vol. II, 112.

(34) Letter's Manual of Buddhist Law *Ibid*

(35) Kin Wun Mingyi's Digest. *Ibid*

(36) *Hagana Dhammathat*, Dr Forchhammer's, *Ibid*

(37) Crokes on Caste and Tribes *Mariam Bibee v. Sheikh Mahmood*, 28 C. L. J. 366

(38) Riekeley's Tribes and Castes in Bengal *Santa v Dadasuvar*, 27 C. W. N. 669

(39) Hunter's Imperial Gazetteer of India *In the matter of the German Steamship Drachenfels*, 27 C 860.

(40) Encyclopaedia Britannica. *Annu Kumaru v Muthupayal*, 27 M. 531-14 M. L. J. 248.

(41) District Gazetteer of Bengal. *Lalu Dome v Duoy*, 13 C. 217-20 C. W. N. 401

(42) Hunter's Statistical : : : : : *Dadasuvar*, 27 C. W. N. 669, *Secretary of St.* : : : : : *Dadasuvar*, 27

(43) Mandsley's Respons : : : : : *Empress v Kader Nath Sha*, 28 C 603

(44) Backnill and Tuke's Psychological Medicine *Ibid*

(45) Simcox's Primitive Civilization *Rama Samu v Nagendra Narain*, 10 M 33.

(46) Notes on Buddhist Law by Jardine. *Ms Me v Ms Shuc*, 16 C W N 529 (P. C)

Anna Kumaru Pillai v Muthupayal, 27 M

Pearl Fisheries and Marine Fauna of the

Fisheries *Ibid*

(50) Rajendra Lal Mitter's Buddha Gaya *Jaspala Gur v Dharam Lal*, 23 C 60

(51) Martin's edition of Buchanan Hamilton's Eastern India *Ibid*
and Custom *Cheru Kuneth v Vengunat*,

Ibid : : : : : *Ibid* : : : : : *Ibid* : : : : : *Ibid* : : : : :
of Malabar *Agustine v Medlicot*, 15 M 19 M 51

(54) Dr Lyon's Medical Jurisprudence for India *Fikan Singh v Dhanuvar*, 24 A 415

(55) Medical Gazette *Ibid*

(56) Murphy's Obstet Rep. *Ibid*.

(57) Playfair's Midwifery. *Ibid*.

(58) Treaty with Nawab of Bhopal by the East India Company *Lachmi*

Damodar v Deoram, 1 B 367 (P. C)

abhan v Bas Huabhan, 7 C W. N. 712

oms and ceremonies." *Ramaswami v*

58. (62) Shakespeare's Dictionary *Gagan Pur v Achubur Pur*, 16 A 191 (P C)
 (63) Fergusson's History of Architecture *Secretary of State v Shunmugaraya* 16 M 693 P C = 20 I A 80
 (64) Houghton's History of Christianity in India *Augustine v Medico*, 15 M 241
 (65) Stephen's History of Criminal Law of England. *Queen Empress v Hedar Nasse*, 23 C 604 (608)
 (66) Geographical, Statistical and Historical Account of Orissa by Sir Ling Shyamanand v Rama Kantia, 32 C 6, 13
 (67) 'India Orientalis Christiana' *Augustine v Medico*, supra.
 (68) Will's History of Mysore *Ialir v Truamala*, 1 M 213
 (69) Ibbetson's Census Report *Ghulam v Secretary of State*, 6 Lah 269
 (70) Wynyards Settlement Report *Byat v Bhupendra*, 17 A. 456 (P C)

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admission.

Principle A Court, in general has to try the question on which the parties are at issue not on those on which they are agreed *Burjory, Cursetji v Munckarji*, 5 M 143 (152), *Mo Gowan v Smith* 26 L J Ch 8. An express waiver, made in Court or preparatory to trial, by the party or his attorney, conceding for the purpose of the trial the truth of some alleged fact has the effect of a confession pleading, in that the effect is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn—i. e., ceremonial or formal—or judicial admission, or stipulation. It is, in truth, a substitute for evidence, in that it does away with need for evidence. *Wigmore* § 2538. It waives or dispenses with the production of evidence by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true. *Wigmore* § 1038. "Agreements of this character, intelligently and deliberately made,—whether made by the parties in person, or by their attorneys or solicitors of record,—are encouraged and favoured. Their purpose generally is to save costs, and to expedite trials, by relieving from rules of practice which in the particular case are deemed mere hindrances, or the dispensation with mere formal proof, or, as in the present case, the admission of uncontroverted facts, of the existence of which the parties are fully cognizant." *Peo Brickel J in Prestwood v Watson*, 111 Ala 604 (Am.); *Wigmore* § 2538.

Scope of the section No evidence is required of matters which are admitted for the purpose of the trial. Admissions for the purpose of dispensing with proof at the trial which are called judicial admissions must be distinguished from those tendered at evidence,—the former not being usually receivable in other proceedings and the latter not being usually conclusive. *Phup Li 7th Ed 18*. This section includes judicial admissions including admissions made in the pleadings. The effect which a judicial admission produces is of course an effect showed in common with certain other legal acts. In the first place, a pleading may, by confessing a fact, place it beyond the range either of needing evidence or of permitting dispute, and an omission to plead in denial may have the same consequence. The distinction between a pleading and a judicial admission seems to consist in the circumstances that the latter may be made after issues joined or trial begun, and may thus counteract or diminish the effect of a pleading, that it is not a part of the required statements defining the parties' issues; and that it is therefore not subject to the rules of time.

form, amendment, and the like, which govern the allegations of pleading. *Wigmore* § 2589 Under this section no fact need be proved which the parties at the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. Where a plaintiff admitted, in a written statement in a former suit and in question, an agreement set up by the defendant took for consideration not to redeem a mortgage, the defendant in the face of

Maunq Kot

to civil as well as to criminal cases *Bhulan v Emperor*, 31 Ind Crs 233, *Bansilal v Emperor*, 30 Bom L R 646=52 Bom L R 686=A I R 1928 Bom 641 This section has in general no application to divorce cases *Over v Over*, 27 Bom L R 251=A I R 1925 Bom 231=49 B 368 This section normally relates to agreed statements of facts made between both parties to save time and expense at a trial. But facts, and no pleading has been put in admission has been made in his pleading, complaint to the contract in suit having no practices of the office is no indication whatsoever to the defendants that the plaintiffs rely on one of the supposed terms of this "office dhara" in support of their claim, or that one of the supposed terms of this "office dhara" is an implied stipulation.

ful consideration, with regard not only of but with regard to the time at which they were made, their use in the action of which they form the basis, their use *dehors* that action, the change brief by the circumstances making them, including knowledge and those alleged matters of fact evidence against such 272. The admission relating to the progress

must be some other proof of authority to make the admission *Wagstaff v. Wilson*, 4 B & Ad 339

There is another class of judicial admissions, made by the payment of money into Court, upon a rule granted for that purpose. Here, it is obvious, the defendant conclusively admits that he owes the money thus tendered in payment (*Bhichun* 558); that it is due (*Bendict*, 5 Bing 28; 285, *Huntington v*

claim it in the character in which he sues *Liscombe v. Holmes*, 2 Camp. 411); that the Court has jurisdiction in the matter (*Miller Williams*, 11 Esp. 19 21); that the contract described is rightly set forth, and was duly executed (*Gutteridge v. Smith*, 2 H Bl 374, *Israel v Benjamin*, 3 Campb. 40); that it was broken in the manner and to the extent declared (*Dyer v. Ashton*, 1 B & C. 3), and if it was a case of goods sold by sample, that they agreed with the sample (*Leggett v Stapleton v. Nouell*, *Walker*, 9 Dowl 21,

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may make admissions for the purpose of
by agreement or otherwise, before or at the
admissions may be made by pleadings
226; *Burjoj*).
the client.
to a decree
6 W. R. 132
by reference

needed to be
any further
or contradict
no evidence
Ibid § 2591 A party or his agent

admission of oral evidence contained in the 4th proviso to section 92 of the
Evidence Act *Ibid*. But in the same case *Seshagiri Aiyar J* said: "The rule
of law enunciated in *Stallard v. Pooley*, 6 M. & W. 664, which accepted oral
admissions of every kind as proving documents, has no doubt been departed
from in India [see section 23 of the Evidence Act and sections 59 and 65(b)]
in the nature of

proved.

Different kinds of judicial admissions This section deals with admissions
made voluntarily, or pursuant to a notice

counsel or of shorthand writers, are admissible to controvert the statement
the Judge. *Reg. v. Pestonjs*, 10 B. H. C. R. 75(81).

facts admitted at the
If it means before the
ready applies to it. If
then, in a civil case, no
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a plea of not guilty, can
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hearing. Thus where A
first hearing orally asserts payment in full, at the final hearing no evidence of
title or tenancy need be given. *Whitely Stokes*, Vol. II, p. 889. When an

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810 Where the defendant admits the signature of his father in the mortgage deed, the plaintiff is relieved under this section from any further responsibility of proving the document. *Lakshichand v Lalchand*, 42 B 352=20 Bom L R 354=15 Ind Cas 351, *Arjun Sahu v Kelai*, 2 Pat 317=71 Ind Cas 150. Where the fact of a prior partition of parties, the same need not be proved. Is not registered will not make the purpose. *Maung Po Kim v Maung Shue* 1 Rang 405=1924 Rang 155.

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under consideration when the Judge is considering what issues are to be tried, be genuine, unless they are admitted on given to the Court by the last provisions of the Civil Procedure Code, at issues are to be tried before the to allow a party to withdraw his

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been held to preclude any evidence on the point. *Uiquhart v Butterfield*, 37 Ch D 357, 369, 374 C A, *Ellis v Allen*, (1911) 1 Ch 904, *Plap Ev 7th Ed 15*. Admissions made or by stipulations action, drawn if not true, be with party in which to prepare his case, and provided such party has not been injured by relying on such admissions. *Wallace v Mathews*, 39 Gr 617 (Am). Such admissions will not be allowed to be withdrawn, however if the situation of the parties has been substantially changed, as by the death of a party or of a witness. *Wilson v Bank of Louisiana*, 55 Gr 98 (Am). If a party desires to withdraw admissions of the character under discussion, he should give full and timely notice of his purpose, so that the other party may have reasonable time to supply the proof. *Harquies v Redel*, 43 Gr 142, *Ellons v Larkins*, 5 Cr & P. 385, *Burr Jones* § 274.

Admission by pleading. "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability." *Civil Pro Code, Order 8, rule 5*. That rule states what amounts to admission. Defendant must deny not admit the truth.

If not denied in the written statement or stated to be not admitted, shall be taken to be admitted by the defendant. (*Rule Mullas' Civil Pro Code, note under rule*

tion of his opponent, or he may state he does not admit the allegation. But an allegation which is not specifically denied, or stated to be not admitted, is treated as admitted. *Bpl v Nunn*, 11 Ch D 751 all 7 Ch D 251, *Green v. Selim*, (1879) 11 Ch D 559; *Collis v Gossle*, 7 Ch D 512. A refusal to admit must be stated as specifically as a denial. *Thorp v. Hollisworth*, 3 Ch.

58 D 637, 640; *Hall v L & N W Ry Co*, 35 L T 849 Leave in a proper case may be given to a party to recall admissions which he has made. *Hollis v Burton*, (1892) 3 Ch 226 C A Where a document is by reference included in

In revision it was contended that the plaintiffs had not proved the notice *Held* that the defendants must be deemed to have admitted notice under order VIII, rule 6, C P Code, and proof was dispensed with under s 58 *Commissioners*

for
make the suit triable only by the
however, made over the trial of the
who had no jurisdiction to try it,
Neither party raised any objection on the ground of jurisdiction and no issue was raised relating to it. The trial proceeded on merits and the subordinate Judge passed a decree for partition in favour of the plaintiffs. The defendants in their appeal to the District Court raised for the first time the question of jurisdiction on the strength of the market value stated in the plaint. The objection having been overruled, they appealed to the High Court. Held that as neither party raised any question as to want of jurisdiction arising from the allegation in the plaint, and as they by their conduct and silence treated the market value to be the amount sufficient to give jurisdiction to the Court, they dispensed with proof on the question by their tacit admissions, and thus the principle of law laid down in s 58, came into operation and prevented the result of the statement of the market value in the plaint. *Jose Antonio v Francisco*, 12 Bom L R 712 Where the defendants in their written statements admitted that they had executed a deed of mortgage on account of an old

the production of the mortgage deed was unnecessary under the provisions of section 58 of the Evidence Act. *Maung Khan v Maung Myat*, 11 Ind Ca 380 Plaintiff sued for redemption alleging that he had sold the land in suit out and out to the defendant for Rs 250 less than 12 years before suit but that at the time of sale a stipulation was made for repurchase by the plaintiff at any time on payment of the purchase money. Held that as the plaintiff had admitted in the plaint the factum of an absolute sale in favour of the defendant it was

when a party makes solemn admissions against his interest in a pleading, they should be treated as admitted facts, and he will not be heard to question the correctness of the statements.

the pleading. On this point the case of *Mc Gowan v Smith*, 26 L J 100 the other referred to, seem conclusive. A Court, in general, has to try the

questions on which the parties are at issue, not those on which they are agreed, S. and admissions which have been deliberately
 suit, whether in pleading or by agreement,
 mission of any evidence contradicting them
 that is by reference incorporated
Evidence, 457) The point is not
 ments of the parties a plea or
 does not directly put in issue

st object of
 what is the
 In App at
 the cause
 the plaintiff

or in the written statements tendered in the suit which here contain a full
 assertion and admission of the execution of the document A by the defendant
Munchery. But the issues, as they stand, were suggested by the defendant's
 counsel. They waive controversy as to the actual execution of the document,
 assume it to have been executed, and raise questions only that depend for their
 plaintiff is not,
 or to put it in evi-
 for some purpose

on consider
 effect usual
 allowed to
 But an ad
 exists and

that fact subsequent to the date of the admission *Lauson's Presumptive Ev*
2nd Ed 237, McLeod v Waleley, 3 C Lord
Tenterden C J said 'I do not think,
 can
 be extended to a publication after its
 goes
 down to its date, but not further"

Distinction between evidentiary admissions and admissions by pleadings.
 There is a distinction between evidentiary admissions and admissions by the
 pleadings. This section governs admissions by pleadings *Sadhu v Naa*
Siggy, U B R
 sing with proof
 evidence, the for

the fullest sense of the term, is another thing,

and involves a totally
 the necessity of offer
 item in the mass of evi
 with which this section
 need of any evidence
 course of judicial process
 evidence by conceding
 alleged by the opponent is true *Hagmore § 1058*

s of husband or wife lose, as a
 they are to be used in divorce
 establishes a form of fraudulent
 her contracts, the contract of
 and argument of the parties,

and in actions for dissolution of this contract, that is for divorce, admissions
 are closely scrutinized. Although the husband and wife are the parties to the

8. consent of and in the manner prescribed by the State. It necessarily follows that no admissions by either party to the contract, however collusive upon such party, can be conclusive upon the State in a suit for the dissolution of the contract and that such dissolution cannot safely be deemed unless the admission be corroborated by strong proofs. *Burr Jones* § 262. In *Williams v Williams*, 1 Hagg 299, Lord Stowell says that a confession is a species of evidence which though not inadmissible, is to be regarded with great distrust, while in *Mortimer v Mortimer*, 2 Hagg 310, the same learned Judge announces that a confession, though in the support of a charge, is not a confession perfectly true and conduct ranks among the highest species of evidence. The suit for divorce has been called a triangular proceeding *in genere*, in which the government occupies the

allow of an accused admission

there is nothing to prevent
Criminal Procedure on
admissions on matters
seems to be no reason
his presence at the trial so as to dispense with the attendance of witnesses for
the
But
case

In India

by consent. *Per Patteson J* in *ibid*, *courts*, *Phips* 11. When the attorneys on both sides had agreed that the formal proofs in perjury should be dispensed with, and that part of the prosecutor's evidence admitted, *L Abinger C B* said. 'In a criminal case tried on the crown side of the assizes, I can not allow any admission to be made on the part of the defendant unless it is made at the trial, 8 C & P 575 (1838), *Queen v Kazim Munde*, Cr 80; *Jeremiah v Vas*, 36 Cr 11. *Queen v Emperor* 26

difference. Furthermore, I am not convinced that s 58 Evidence Act does not apply to justify the action of the Sessions Judge. No doubt in England

an admission by an accused, which falls short of his pleading guilty, is not taken into account and is not binding against him. But section 58 makes no exception in regard to criminal proceedings and while I do not say that it can be availed of to cure a clear contravention of any directions of the Criminal Procedure Code as to the course of a trial yet I think it can apply in a case like this, which relates only to proceedings of an appellate Court." *Bansal v Emperor*, A I R 1928 Bom 211 (247)=112 Ind Crs 120=52 B 686=30 Bom L R 646. But admissions made by a pleader appointed to help the accused in his defence are not binding on him to his prejudice. *Per Mulla J in ibid*. This above rule is especially applicable in murder cases. *Sheo Narain v Emperor*, 21 Cr L J 777=58 Ind Cas 457. It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death. *Hasaruddin v Emperor*, A I R 1928 Cal 775, see also *Emperor v Bhadu*, 19 A 119, *Laxmaya v Emperor*, 19 Bom L R 356, *Emperor v Chuna* 8 Bom L R 240. The rule is the same in America. *Vule State v Max* 78 Conn 19, where *Hamersley J* said "It is true that in the trial of capital offences the Court will and should exercise care and discretion in respect to admissions made by the accused or by his Counsel in open Court, and so even a plea of guilty will not ordinarily be accepted." *Wigmore* § 2597.

Proviso. This proviso corresponds to proviso to rule 5 of Order VIII of the Civil Procedure Code. Both under section 58 of the Evidence Act and under Order VIII, rule 5 of the Code of Civil Procedure the trial Court has a discretion to require proof of the due attestation of a statement of admission by the defendant if the statement has not been duly executed. *Munappa v* : : :
L W 5=25 M L T 19-19 Ind Crs 278

as the proviso to rule 5 of Order VIII of the Civil Procedure indicates the Court has not to be construed Order 10 of the English Order VIII of the Civil Procedure Code does not contain the proviso. There the rule of pleading is very stringent. According to that rule a defendant who omits to traverse in his defence any allegation of fact in the statement of claim is not allowed to traverse

supported by s 58, proviso of the Evidence Act. *Bhagwan Das v. Shoray*, A I R 1931 Oudh 321=14 O L J 463

59. namely, the case in judgment, without injury to the general administration of justice *Greenley on Law in Equity* pp 349, 358, *Greenl Ev* § 206, *Chamberlayne's Ev* § 1210

Future of the Doctrine of Judicial Admissions 'The doctrine of Judicial Admissions' says *Prof Wigmore* "has a large future before it, if Judges will but use it adequately. In the first place the Judge should apply it to all informal as well as formal admissions by counsel during trial. In the next place the Judge should freely call upon counsel to state whether a fact is in good faith disputed, & c should require admissions to be made, where it seems probable that the fact is not actually disputed. By this method, the presentation of evidence will be confined to the dispute. It is easy to see how large it may be eliminated how much time would be saved. And this would be an existing principle. Already in England in the modern practice of settling issues before masters. But it can also be used by the Judge at the trial. *Wigmore* § 2597

Formal Judicial Admissions, conclusive 'The formal judicial admission

party, even in an appellate Court or even on a subsequent trial of the same case, unless formal judicial admission shall have been made for a temporary purpose. *Chamberlayne's Ev* § 1264

CHAPTER IV.

OF ORAL EVIDENCE

Proof of facts by oral evidence

59. All facts, except the contents of documents, may be proved by oral evidence

Oral evidence Oral evidence is evidence which is confined to words spoken by the mouth. *Per Petheram C J* in *Queen-Empress v Abdul*, 7 A 385 (397) F B. It includes all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry. *Vide* s 3. It is what the English lawyers call "testimonial evidence." Testimony is a species of evidence by means of witnesses. The broader term 'evidence' includes that which is given by witnesses or offered by documents. *Vide* s 3. In *People v Kenyon*, 5 Park Cr (N Y) 254, 288, Mr Justice Campbell said 'It may be well to bear in mind that there is marked difference between testimony and evidence. The latter is much more comprehensive than the former—evidence being whether by

produced to a jury from the finding of any issue joined between parties

Testimony in legal as well as in common usage, signifies a statement of facts by witnesses, and to disprove the testimony of a witness is to disprove the "facts testified to by him." *Lurr Jones* § 11

Wordings of the section. This section is not very happily worded. Contents of documents may be proved by oral evidence under certain circumstances that is to say, when such evidence of their contents is admissible as secondary evidence. See section 63 cl 1, section 12, cl 8, *Nat. Ev* 239

Contents of a document cannot be proved by oral evidence. It is a cardinal rule of evidence—not one of technicality, but of substance, that, where written documents exist, they shall be produced as being the best evidence of their own contents. *Phonograph Roy Luchmiah* 6 C L R 101=7 I A. 8 This section is based on the "best evidence" rule. *enclaf*

A fourth rule, which governs . . . which requires the best evidence of . . . This rule does not demand the greatest amount of evidence, which can possibly be given of any fact but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when it is apparent, that the better evidence is withheld it is fair to presume, that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact it is meant, that no evidence shall be received, which is merely substitutionary in its nature so long as the original evidence, can be had. The rule excludes only that evidence which itself indicates the existence of moral original sources of information. But where there is no substitution of evidence, but only a selection of the weaker, instead of stronger proofs, or an omission to supply all the proofs capable of . . .

Thus a title by deed must be . . . is within the power of the party, . . . is susceptible, and its non production some matter of apparent doubt of the deed itself may be proved though the other also is at hand. And even the previous examination of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor. So in proof or disproof of handwriting, it is not necessary to call the supposed writer himself. And, even where it is necessary to prove negatively, that an act was done without

general necessary to call
Ev § 82 In the case of
held it very dangerous
to be proved by the testimony

of witnesses, the con-
Similarly in *Vincent*
always (perhaps more
what is in writing sh-

the Court
"I have
rule that
experience has
in of witnesses, how-
they may be so easily
strict enforcement of
C II 912, *Sheridan's*
st Imam v Hargobind,
W R II (P C)=2
1 M I. A 19 (42, 43);

to pro-
v. Go-

Oral evidence may suffice
W R 155; *Shee Sahayee*
79 Oral evidence, if
cription. *Mcharbin v.*
without documentary
v. *Aluma*, 8 W R 366.
as relatives will be

admitted in the absence of any registers of births and deaths. *Moheddeen v. Mahomed*, 1 Ind Jur O S 132=1 M H C R. 92. It is not valid reason to

9. disbelieve the evidence of a witness

Rajendur Kishore, 9 W R 125, but see
Goluck Chandra v Raja Sircend Buddhadhar, W R (1861) 136 Oral evidence
 agreement; and, if sufficient, will justify
Nund Mohun, 12 W. R 391 A Judge
 value, without a *pattah* and *lobuljat*

to prove the quantity
 misdirects himself in
Dinoo Singh v Doorq
 while to prove an adj
Ram, 1 M H C R 100
 adduce oral
 W R 181
 in the absence

of document may
 in *Guccalur*, 20
 d in ruling that
 is not sufficient to

rabjt, 1 B H C
 writing is admissible

Oral evidence,
 conflicting and who
 decisive conclusion,
 in the case, and w
 both sides about the truth of which there can be no doubt. This alone can be
 the true method of arriving at a correct conclusion *Abdul Halim v Rajah*
Sadat Ali, 108 Ind Cas 817-A I R. 1928 Oudh 155 Statements made by a
 witness at the trial should be altogether rejected when it is in hopeless conflict
 with his previous statements
 P L R. 659-A I R 1925:
 uncorroborated statement of a
 12 years ago and which wa

credit This precaution is nowhere more necessary than in this country It is
 true that there is no precaution of perjury against oral testimony, but it has, I
 believe been sufficiently confirmed by a long course of experience that anything
 can be more dangerous than to act upon such testimony, without testing its

credibility both intrinsically and extrinsically'. Where there is contradiction of
in order to see
I. A. 103 (107);

of the Judicial
facts on the

attention to which they depose, or weakened by the mode in which their
speak, it may
to an extrem
is oral, and un
found is ext. It would be very dangerous to exercise the judicial function,
as if no credit could necessarily be given to witnesses, deposing and so
how necessary however it may be always to sift such evidence with great
minuteness and care. This case was cited with approval in the case of *Emperor*
v. Balgangadhar Tilak, 6 Bom L. R. 321 (330)-28 B. 179, see also *Wise v.*
Sanduloomisso, 11 M. I. A. 187 (183); *Queen v. Elahi Bux*, B. L. R. (F. B.)
482, *Sitaji v. Chinna*, 10 M. I. A. 162, *Edu v. Behan* 11 W. R. 345. 'But
it would be indeed, most dangerous to say that where the probabilities are in
favour of the transaction, we conclude against it, solely because of the general
fallibility of native evidence. Such an argument would go to an extent which
can never be maintained in this or any other Court, for it tends to establish
a rule that all oral evidence must be discarded; and it is most manifest that
however fallible such evidence may be, however carefully to be watched justice

evidence sub-
st be given to
not be rejected
uted without

Nachear, 14 M. I. A. 351, 355. Such rejection if sanctioned, would virtually
Amul v. Kalanthal

Bunuar v. Hinnaram 4 W. R. 128 (P. C.) In the words of *Baron Parke* in
Mir Assabullah v. Bibi Imaman, 1 M. I. A. 19-5 W. R. P. C. 26, 'there is no
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r, than
cases
affairs

870=A. I. R. 1927 Sind 20

A
of
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ought to have entered into it
consideration, where the evidence
but a case should not be decided up
which the parties have submitted
consideration that which ha

9. W. R 433 Evidence of witnesses though not independent, but not shaken in cross-examination and accepted by the Judge who heard them and saw their testimony told by 31 (P. C)

! test for
- testimony
to the same transaction, and concur in their statement of a series of particular circumstances, and the order in which they occurred, such coincidence exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions, either the testimony is true, or the coincidences are the result of concert and conspiracy If, therefore, the independence of the

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will be c

cited in Nort 53.

witnesses or
Starkie on Li

Test of probability—Sir James F
probability is the guide of life is an obvio

That

extent it generally resembles the common course of human conduct and of physical nature, that it is improbable deviation therefrom, and that it is impossible upon which all language and thought could be in two places at once and that two four; that it is nonsense unless it can be in some way represented to the mind

of this disease or that, and yet to treat with contempt the notion that no one

of witchcraft, and to reject all evidence tendered to prove it? Probably no more difficult question can be asked, and I doubt whether there is any which, if fully solved, would be of great practical importance." *Stephen's General View of Criminal Law of England* pp. 192, 193

Other tests of Probability "Evidence to be believed" said *Vice-Chancellor Van Fleet of New Jersey*, "must not only proceed from the mouth of a credible witness, but it must be credible in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human knowledge, observation and experience.

to the miraculous, and is outside judicial

37 N. J. Eq. 130, 132 But improb

impossibilities. "A case how unlikely and suspicious so ever, in itself, may be irresistibly proved by the force of testimony," said *Sir John Nichol*, "Evidence may be such as to substantiate a transaction, however improbable; for it may be such that the falsehood of the evidence would be still more improbable than the fact which it seeks to establish" *Soph v. Atkinson*, 1 Add. Ecl. 162, 182. In another case the same learned Judge said "It seems hardly possible, on the mere improbability of a statement, to discredit the evidence of a witness of good

59. 213; *Maharajah Rajender v Sheopursun*, 10 M. I. A. 438 So the doctrine "falsus in uno falsus in omnibus" in this country affords a test of little or no value, a story at p 29

if the evidence adduced on both the matters in issue The parties using such evidence may have brought himself within the penalties of the criminal law, but the Court should not

by that party, or at least against such portion of that evidence as tends to the same It may perhaps also have the further mission for the evidence of his opponents used too far, especially in this country where it happens, not uncommonly, that falsehood and fabrication are employed to support a just cause *Goribulla Karze v Goorodas Roy*, 2 W. R. (Act X) 99, see also *Rameswar v Bharat*, 4 C W N 18 P C, *Casper v Kedarnath*, 5 C W N 858 (861)

Uncontradicted testimony. I "he who tells nothing exceeding the that they should believe him who Johnson "If witnesses come unimpaired in point of general integrity," said Lord Stowell, "if any depose with character of fairness in their particular narrations the facts must be received, or there is an end of all judicial inquiry Human prudence has done its utmost, has done all that it is capable of doing, in giving every 1 Hag Cons 269, judicial proceeding

have no safeguard, and the dress of wrongs, if the unanimity can be overthrown without 535. So "if the tribunal is permitted to discredit or disregard such testimony, *City R Co* 50 Misc (N Y) *Harbison*, 13 Int Rev 118.

performed, if it would obtain your give no right arbitrarily, and without *Harbison*, 13 Int Rev 118.

Disinterested witness "A witness of depraved and abandoned character

rule that when a disinterested witness testifies to
 in conflict
 be taken as
 not be disregarded by Court or jury." *Kavanagh*
v. Wilson, 70 N. Y. 177, 179 (Am.)

of view of the same thing.
 a single incident, Courts expect
 minute of their testimonies,
 basis for discrediting their united testimony to
 rather to enhance the credit of the witnesses
Haranand v. Ramgopal, 27 C. 639 (P. C.) = 1 C. W.
 "No two witnesses' said Mr. Justice Van Buren
 in *Lyly v. N. Y. Supp.* 636
 nating in the execution of a pr
 agreed in their description of t
 agreement is all that is required *Nana Narain v. Huree Pantee*, Mar-hall 436
 (P. C.) It is to be expected that what was
 will be differently stated by different
 conversation hear or remember all that was
 impressions from what they heard, and
 of dates or of th
Moore on Fact
 to testify is at
 contrariety of
v. Maule, 4 Hag
The Louther C
 is taken *de recenti facto* may very well speak with greater certainty and specihca-
 tion as to the facts than other witnesses who testify at a much later time *The*

untruthful nature of the
 presumption in England
 here the presumption is,
 observations of the Privy
 Indian Courts in *Raman*
 But however true this may
 are more untrustworthy
 the fact is to be lamented,
 score of this difficulty"

North Ev. p. 55. Differences are commonly reconciled

without resorting to strained and unnatural inferences in aid of either party.

60. *Moore on Facts* § 839 In *a New Jersey Divorce Case*, Chief Justice Beasley said: "To those who know from experience and reflection the laws which regulate the human memory, it does not seem singular that several persons, in speaking of a past transaction, do not each reproduce it in description with the same fulness of detail; but such is not the vulgar notion. Among the ignorant the strongest proof of the truth of testimony derived from several witnesses is the fact that the statement of each is merely identical with that of others. Hence, the exact similarity which we often see in the deposition of corrupt witnesses, whose evidence has been prearranged. But in the testimony of these two persons now before me, there are none of the usual marks of collusion. No two narrations unlike. It certainly has every currency, observed from different sources." *324 (337) (Am)*; see *11 Anna v*

Court of New Brunswick
pre-concert between
proves nothing of the
as manufactured, if
witnesses should vary

the account in order to avoid suspicion" *Cornu v Carajuel, R Co*, 20 N
Burns 425, 436

Sometimes, however, discrepancies are so startling as to make it impossible

be detected upon some broad collateral fact, than upon the transaction itself
Brydges v King, 1 Hag Ecc 256

Oral evidence must be direct. 60. Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence of S. condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Principle The first degree of moral evidence, and that which is most satisfactory to the mind, is afforded by our own senses; this being the direct evidence of the highest nature. Where this cannot be had, as is generally the case in the proof of facts by oral testimony, the law requires the next best evidence; namely, the testimony of those who can speak from their own personal knowledge. It is not requisite that the witness should have personal knowledge of the main fact in controversy, for this may not be provable by direct testimony, but only by inference from other facts shown to exist. But it is requisite that, whatever facts the witness may speak to, he should be confined to those lying in his own knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be. For it is found indispensable, as a test of truth and to the proper administration of justice, that every living witness should, if possible, be subjected to the ordeal of cross examination, that it may appear what were his

known, cannot be subjected to this test, nor is it often possible to ascertain through whom, or how many persons the narrative has been transmitted from original witness of the fact. *Greenl. Ev* § 93. "The administration of an oath furnishes some guarantee for the sincerity of the opinion, and the power of

value
F 689.

not a party to the suit is not admissible; because such person was not under oath and the opposite party had no opportunity to cross examine" *Suist C J.* in *Chapman v Chapman*, 2 Conn 318. *Gresham Hotel Co v Manning*, Ir. R. 1 C L 125, *Vide* notes under § 32 pp. 464—467 *supra*.

or any one of
have received
received some
may be given
recollection of
Recollection, or Memory *Thirdly*, he must communicate this recollection to the tribunal; that is, there must be communication, or Narration, or Relation (for there is no single term entirely appropriate). Now the very notion of taking a human utterance as the basis of belief in the truth of the fact asserted impliedly attributes these three processes to the witness, Perception, Recollection, Narration. Whatever principles, therefore, affect the inference from testimonial assertions must have reference to some one or more of these elements.

Moreover, in the function fulfilled by each of three elements or processes are to be found in its probative value has in some way or reproduced to us in C perception, or whatever is called) should adequately represent, or correspond to the fact itself as it objectively existed or exists. The strength of the inference depends on the probability of a fairly accurate perception on the part of the witness. Again, the function of Recollection is to retain or recall impressions of observation; and the necessary condition of our trust is that Recollection fairly corresponds with or reproduces the original knowledge or Perception. Finally, the function of Narration (or, communication) is to reproduce and express, for the apprehension of the tribunal the Recollected results—themselves already retained from Perception. Thus, the common aim in the varied

60 problems under this head is to determine whether the story as told represents with fair accuracy the object which the witness once observed and now recalls — *Wigmore's Principle of Judicial Proof* § 147.

Generic Human Traits affecting Testimony But the individual witness' testimony is affected, not merely by the conditions inherent in these three elements of testimony, but also by certain general traits, common to humanity, on which experience has enabled us to generalize. These generalizations affect traits common to large groups of individuals, or to a large class of situations in which any individual may at times find himself. Hence the conditions are studied under two

Testimonial Capacity
The principle generic
ice; (2) Age, (3) Sex;
eriment, (7) Emotion
ciples of Judicial Proof

§ 148

Race "In respect to the three elements of testimony, Perception, Observation have thus

in many sense perceptions than literate peoples having a more complex life

"(2) *Recollection* An occasional particular race or people is all that has the trait that primitive peoples, develop an extra ordinary mnemonic sagas, laws, and revelations by the early witness, attention, and others

"(3) *Narration* (A) As to relative racial differences in the capacity of expression in words, little or no occasion arises for examining this subject in judicial proceedings (B) As to veracity of aliens in general, and of particular races, considerable knowledge has been made available for us (a) The alien in general, by rings, his racial sentiments, and tation both to save himself by falsifying in their favour But

(b)

B) 482, *Sitay v Channa*, 10 M I A 162, *Edu v. Behan*, 11 W R 345 But

Basheroomssa, 10 M I A 23 B.
neror v. Balgangadhar, 23 B.
en v. Elahi Buz, B L R (F
So enquiry and
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ma, 4 M I A

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fruit, and one of its best fruits has been an increasing regard

them as the same classes in
not their existence among their
h El pp XXXI, XXXII.
: "Few people, I think, realize

are the
others
Wigmo
that an

a particular race of people, is likely to be, in the first place, absolutely incorrect
as not founded on facts, in the second place, relatively unjust, as assuming a
superiority of honesty which can only be hypothetical; and in the third place,
unwise, as tending merely to perpetuate ill feeling and misunderstanding."
Wigmore's *Principle of Judicial Proof* § 155

testimony,
We possess
become less
keen, and that for recollection the recollection of earlier events becomes more
active and that of recent events less active (2) Youthful age, it would seem, is
others In recollec-
-n that children below
Imagination, partly
cause of untrained

of *Judicial Proof* § 156 Certain broad rules

defined situation I
such cases,
f age Love and
hatred, ambition and hypocrisy considerations of religion and rank, of social
position and fortune, are as yet unknown to them, it is impossible that pre-
conceived opinions, nervous irritation, or long experience, should lead them to
form erroneous impressions, the mind of the child is but a mirror that reflects
accurately and clearly what is found before it These are great advantages
accompanied by certain corresponding draw backs The greatest is that we can-
it use indeed the same
ent ideas Further the
ple The conception of
uty and ugliness, of dis-
from in ours, still more

so when facts are in question There is yet another difficulty, the horizon
of the child being much narrower than ours, a large number of our perceptions
are outside the frame within which alone the child can perceive We are
as a rule, too distrustful of the capacity of a child We have rarely found too

60 problems under this head is to determine whether the story as told represents with fair accuracy the object which the witness once observed and now recollects—*Wigmore's Principle of Judicial Proof* § 147.

Generic ..
testimony is

separate heads (1) Generic Human in General, (2) The Testimonial Elements can be taken up under the following (4) Mental Derangement, (5) Moral (Bias); (8) Experience (acquired skill § 148.

of life

"(2) *Recollection* An occasional study of the memory-capacity of a particular race or people is all that has been thus far vouchsafed to us, except the truism that primitive peoples, depending largely upon unaided memory, develop an extra ordinary mnemonic capacity,—as in the oral transmission of sagas, laws, and revelations by the early Greeks, Hebrews, Scandinavians, and others

"(3) *Narration* (A) As to relative racial differences in the capacity of expression in words, little or no occasion arises for examining this subject in judicial proceedings (B) As to veracity of aliens in general, and of particular races, considerable knowledge has been made available for us (a) The alien in general, by reason of his strangeness to the surroundings, his racial sentiments, and his special dilemmas, has often a temptation both to save himself by falsifying and to save his fellow races by falsifying in their favour. But this

v. *Elahi Buz* B L R (r
Behan, 11 W. R 345 But
any scientific enquiry and
are and whose knowledge of his

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Evidence /
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sufficient
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he may sat
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fruit, and

one of its best fruits has been an increasing regard to truth

on mere differences of error which is relatively truthfulness. But this All of us know persons probative to us. But

we, as knowers of this, must ourselves come before the Court as ordinary witnesses, and how can the tribunal ever be made to believe us and to appreciate the fact as keenly as we do? Moreover, taking as a proved fact this specific trait of veracity or untruthfulness, is it not the cruel abstraction of the layman? Are there not varieties of veracity or untruthfulness? Can those varieties be discriminated and defined? Can they perhaps be identified in particular persons? If modern psychoanalysis can furnish such data, they will be useful in valuing testimony. *Wigmore's Principles of Judicial Proof* § 159

Temperament But the elements of Recollection and Narration may be affected by other fixed traits than merely that of mendacity or its opposite ver-

also is concerned in tracing the variety of temperaments and their influence in impeding correct narration. *Wigmore's Principle of Judicial Proof* § 160

three testimonial elements—Per-
ise some aberration from correct-
meant, not merely strong feeling,
perception and conscious reason-

ing *Wigmore's Principles of Judicial Proof*. § 161. The physical basis for this effect of emotion or testimony is explained in the following passage "The effect of desire on belief we are to come to a con-

towards this end
in' As to the way
account 'This in-

fluence of Desire on Belief often operates by simply diverting the attention from counter evidence. The mind is so absolutely preoccupied by certain tendencies, that whatever at all, or, if it does, is immediate resistance offered by the mind dissolve it. But the more often they (i.e., such beliefs) are acted upon, the more completely they become incorporated with the original conviction so as to become an integral part of it, hence the support they receive from it is increased. With influences Belief that is to say, is by giving pre-ideational train sely long for, or especially dread, and by determining the order of ideation to follow, not that of experience, but that which answers to and tends to sustain and prolong the feeling, that its force serves to warp belief, causing it to deviate from the intellectual or reasonable type. Feeling, then, acts in part by warping the intellectual element in Belief

"Emotion is a great source of illusion, because it disturbs intellectual operations. It gives a preternatural vividness and persistence to the ideas answering to it, i.e. the ideas which are its excitants or which are otherwise associated with it; hence when the mind is under the temporary sway of any feelings as, e.g., fear, there will be a readiness to interpret objects by help of images or the control of fear will be apt to ever there is any resemblance to
" *Arnold's Psychology Applied*

60.

What
(2)

Emotion are in general the same as described already in dealing with evidence of human traits generally viz., external circumstances pointing to the stimulation of an emotion, conduct or words revealing its interior existence, and a prior or subsequent existence of the emotion. The external circumstances are of a great variety—interest in the cause as a party or beneficiary, relation-ship to a party, occupation, such as

banker
But no
had any
rds of the
too, no
known
recepts
emotion

on a particular witness' testimony (whether in perception recollect on or narration) remains also as a problem for the future. But under both these heads the books abound with recorded observations of the marked effect of emotion on testimony, and of the various data from which that emotion has been inferred. *Wigmore's Principles of Judicial Proof* § 161

Experience By experience is here meant that succession of mental processes which result in expertness. It signifies the frequent repetition of sensations, perceptions, and recognitions of a particular subject so that by concentration the capacity to recognize grows in completeness and accuracy. The growth of this experience may take place casually, through one's habit of life, or by deliberate purpose to acquire skill, as in devotion to an occupation, or still further by systematic education in an organised body of knowledge, as with a scientist or an artist. Now the influence of experience on capacity to make correct testimonial assertions is double and opposite. It may increase the range and accuracy of his perception and narration and it may decrease them. *Wigmore's Principles of Judicial Proof* § 162

(1) It may and usually does, increase them because it enables them to perceive details and relations of fact not cognizable without such experience. There is literally no limit to the possibilities of enlarging and precisioning the data of judicial proof. 160

topics, to develop a bias or fixed idea affecting the perception on certain topics and to induce in narration an obstinate adherence to conclusions already reached on the particular facts. This tendency of course varies with the individual and the topic but it is always a latent possibility. *Wigmore's Principles of Judicial Proof* § 162

Perception—General The perception of the direct exercise must purport to have existed life and in historical inquiry

M because Y told him
or a book Z asserted fact
ha

M but in such
assertion by
Y or by Z. In
assertion of Y
of inference

separate the two assertions, i.e. that of X (testifying to the assertion by Y or by Z, and that of Y or Z (testifying to the assertion by X). Hence the element of sense perception by X is as a basis of judicial action. If in a book the assertion by Y that

make the assertion, and our further examination is required for Y's assertion
 "If Y's as-ertion is hearsay (in both the
 ut we give testimonial consideration to it
 is X's—*Wigmore's Principles of Judicial*

Proof § 163

Senses—General considerations: "The sensation brought to the brain by means of the optic nerve becomes the condition of the representation in consciousness of certain objects distributed in space. We make use of the sensation which the light stimulates in the mechanism of the optic nerve to construct representations concerning the existence, form and condition of

of the individual. The narrowest, smallest, most particular issuing glance is that of the most foolish; and the broadest, most comprehensive and comparing glance, that of the most wise. This is particularly noticeable when the time of observation is short.

visual sensations are the most numerous and the most important. Anybody who has been pushed or beaten, and has felt the blows, will if other circumstances permit and the impulse be strong enough, be convinced that he has seen his assaulter and the manner of the assault. Sometimes people who are shot at will claim to have seen the flight of the ball. It is fortunate that, as a rule such people try to be just in answering to questions which concern this substitution of one sense perception for another.

"Still more considerable importance, It consists in the noticeable interruption, when the stimulus does not, as a rule, give rise to that perception. In a case in Court, there was a shooting in some house and an old servant woman, who was busy sewing in the room, asserted that she had just before the person preceding ones. But I am convinced that the witness told the truth. The steps of the new arrival were perceived subconsciously, the further disturbance of the perception hindered her occupation and finally, when she was frightened by the shot, the upper levels of consciousness were illuminated and the noises which had already reached the subconsciousness passed over the threshold and were consciously perceived.

Criminal Psychology, 1911 § 35 p 187

Mistakes of senses, Illusions "As sensation is the basis of knowledge, the sensory process must be the basis of the correctness of legal procedure. The

they heard, no harm would be done, but they tell us only what they suppose to be the meaning, and hence we get a good many mistakes. It does seem as if they are able to shut their ears to all things but the sensory perception is organized according

"The determination of auditory power is, however, insufficient, for this power varies with the degree any individual is in distinguish a single definite tone among many, hear it alone, and retain it. And this varies not only with the individual but also with the time the place, the voice, etc. It is repeatedly asserted, e.g. by T. W. Higginson, that old people do not hear high tones, and that such people are not able to distinguish them with difficulty.

Wundt's statement has been shown that sounds to the right and sounds in the front and below, in front to the right and to the left, and least easily distinguished. Among the Kries, Munsterberg. All these experiments definite mistakes. Sounds in front are often mistaken for sounds behind and felt to be higher than their natural level. Hearing is of great importance. With one ear this recognition is often mistaken by the fact that we turn our heads here and there as though to compare directions whenever we want to make sure of the direction of sound. In this regard, too, a number of effective determine whether the sound is best to get the hearing, and whether he who hear excellently sound. Others again skill from practice, sense of locality, etc. But in any case, certainty can be obtained only by experimentation.

The differences that age makes in hearing are of importance. Bezold has examined a large number of human ears of different ages and indicates that after the fiftieth year there is not only a successive decrease in the number of the approximately normal hearing, but there is a successively growing increase in the degree of auditory limitation which the ear experiences with increasing age. The results are more surprising than is supposed. Old women can hear better than old men." Hans Gross *Criminal Psychology*, Wignmore's *Principles of Judicial Proof* § 168

The sense of taste is rarely of importance it is regularly very significant poisoning. At the same

time, it is necessary, when tests are made, to depend upon general, and rarely constant impressions, since very few people mean the same thing by stinging, prickly, metallic, and burning tastes, even though the ordinary terms sweet, sour, bitter, and salty, may be accepted as approximately constant."—Hans Gross *Criminal Psychology*, Wignmore's *Principles of Judicial Proof* § 170.

know, and that they may learn more by means of them than by means of the

0. associations are awakened, they are not ascribed to the sense of smell, but are said to be accidental *Ibid*; *Ibid* § 172.

The sense of Touch. "I combine, for the sake of simplicity, the senses of location, pressure, temperature, etc., under the general expression sense of touch. The problem this sense raises is no easy one, because many witnesses tell of perceptions made in the dark or when they were otherwise unable to see, and because much is perceived by means of this sense in assaults, wounds, and other contracts. In most cases such witnesses have been unable to observe the touched parts of their bodies, so that we have to depend upon this touch sense alone. Full certainty is possible only when sight and touch have worked together and rectified one another." *Ibid*; *Wigmore's Principles of Judicial Proof* § 174

General Theory of Memory and
here be used to mean the initial proc
" *Wigmore's Principles of Judicial Proof*
association of ideas = our recollection
and memory which are only next to perception in legal importance in the
knowledge of the witness. Whether the witness wants to tell the truth is, of
course, a question which depends upon other matters; but whether he can tell

variously organized function
and much more so when every-

gation. We find little instruction
well as our mistakes are thereby in-
" *Wigmore's Principles of Judicial*

Proof § 192

Different
men exhibit
known, this d
promptness of
ment of rapid
forgetfulness,
but approxima
the field of greatest memory. As a rule, it may be presupposed that a memory
which has developed with special vigour in one direction has generally done this

unreliable . . .
memory and can
alarming, and
people have bare

al people do, and which
the important point they
e to describe important

Children

witness in the world. We have
the child's mind to wipe out: . . .
has made a systematic study: . . .
conclusion that the scope of memory is measured by the child's capacity of
concentrating its attention

"That aged persons have, as is well known, a good memory for what is
long past, and a poor one for recent occurrence, is not remarkable. It is to be
explained by the fact that age seems to be accompanied with a decrease of
energy in the brain, so that it no longer assimilates influences, and the imagina-
tion becomes dark and the judgment of facts incorrect. . .

out 1
limit:
matter and partly mechanical, and the educated rarely have the latter kind
because they have developed the former at its expense; high mental power is
seldom combined with good mechanical memory." *Hans Gross Criminal
Psychology, Wigmore's Principles of Judicial Proof* § 193.

Narration—General Principles of. The third element forming an essential
part of all testimony is the process of laying before the tribunal the witness's
results of his Perception and his Recollection, i e the process of Narration or
communication. In this element, as in the other two, there are many opportu-
nities for errors fatal to testimonial trustworthiness. As with the elements of Per-
ception and of Recollection so here also, experience has shown that certain dangers
are to be looked for. What these dangers and defects are depends upon the
specific virtue which this
possess. Its office is to:
recollection of the witness,
useful or trivial. Its prin-
reproducing and expressing
the witness's Recollection
then, if his Narration or communication fairly represents and corresponds to his
Recollection, and is intelligible by
value are complete, but not otherwise
in either of these respects, namely, in
or in intelligibility, then its value d
defects occur in the former respect, i e an absence, actual or probable, of this
correspondence between the witness's uttered statement and his conscious
recollection which he ought to be stating. In the other respect, i e intelligibility
to the tribunal of the witness's utterance, comparatively few questions arise
Wigmore § 210

1. Hearsay evidence, meaning of—and why it is discarded. The term "hearsay" is used with reference to that which is written, as well as that which is spoken; and, in its legal sense, it derives its value solely from the facts which it rests also in part on the competency

and seeming exceptions, the general rule of law rejects all hearsay reports of transactions given to a witness

tests enjoined by the law for ascertaining the correctness and completeness of his testimony, namely, that oral testimony should be delivered in the presence

heard, or was misunderstood, or is not accurately remembered, or has been perverted. It is also to be observed, that the persons communicating such evidence are not exposed to the danger of a prosecution for perjury, in which something more than the testimony of one witness is necessary, in order to a conviction, for where the declaration or statement is sworn to have been made by a person who is since dead, it is hardly likely that the testimony is an entire fabrication. To these may be added consi-

incur in order to rebut or explain it, the occasioned, the multiplication of collateral issues for decision by the jury, and the danger of losing sight of the main question and of the justice of the case if this sort of proof were admitted, are considerations of too grave a character to be overlooked by the Court or the Legislature, in determining the question of changing the rule. *Mima Queen v. Hepburn*, 7 Cranch 290, 296, per Marshall C J; *Greenleaf* § 99(a)

Oath. One of the objections against Hearsay evidence is that it is not given on oath by the person who has got personal knowledge of a fact. But the utility of oaths in any shape has been strongly questioned. *Benth Jud Ev Bk 2 ch 8*. The good man, it is sometimes said, will speak the truth without an oath, while the answer has been given without an oath, of mankind are cases of import more solemn and boldly say what which they make

they promise, and careful what they assert, puts them upon exactness in every circumstance, and circumstances are often very material things. Even the good might be too negligent, and the bad would frequently have no concern at all, about their words, if it were not for the solemnity of this religious act.

Bishop Secker, as cited in King on Facts, Best Ev § 59 'Of the two main facts which impair the probative force of an unsworn statement used as hearsay, lack of oath and the absence of cross examination, probably the latter is, at the present time, more important than the former. Indeed the importance of the oath is diminished in its value by the cross examination.' *Chamberlayne's Ev § 2712*

Cross examination and confrontation Another essential requirement of the Hearsay rule, as just examined, is that statements offered in testimony must be subjected to cross-examination. But a process commonly spoken of as confrontation is also often referred to as an additional and accompanying test or as the sole test. The main purpose of confrontation is for facilitating cross-examination. But it also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the demeanour of the witness on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not essential to the essential test it may be dispensed with when it is however the essential object of confrontation, as to note here that, so far as confrontation is concerned, the Hearsay Rule, it is merely another name for confrontation. *Wigmore § 1365* The policy of the

Anglo-Indian system of cross examination as a vital for testing the value of

no statements (unless by special stipulation it has been proved and supplemented by lengthening experience. Not even the difficulties which are so often found associated with cross examination have availed to nullify its value. It is beyond any doubt the greatest legal engine ever invented for the discovery of truth. A lawyer can do anything with a cross examination,—If he is skilful enough not to impale his own cause upon it. *Wigmore § 1367*

Scope of the section The expression "it must be evidence" in paras 2, 3 and 4 of the section means "the oral evidence must be evidence." *Whitely Stokes Vol II p 889* So also the word "it" after the words "saw" "heard" or "perceived" in paras 2, 3 and 4. *Neelkanto v Juggobandhu, 12 B L R 110* *p 889* The first four paragraphs have

not direct whether the party against whom it is tendered objects or not. *Whitely Stokes Vol II p 889* But it was never intended by this section to exclude circumstantial evidence of a thing which could be seen, heard or felt. *Karali v East India Co 48 C L J 32-111 Ind Cas 793-A I R 1928 Cal 498* So where a crowd has dispersed without taking any action the intention and common object of the circumstances and

section 45 or of

which they are allowed to express their opinion. See ante. The cogency of this section as to the only of the only to which the immediate the exploded technical language hearsay. A who saw, heard etc, must be produced. The fact cannot be proved through the medium of B who did not see himself etc, but is prepared to swear that A told him that he had seen, heard, etc. So with respect to the fourth case, opinion evidence, when such is

30, admissible, this section necessitates the production of the witness who holds the opinion, it excludes the evidence of any witness who can merely say that he has heard another express such opinion. *Nort. Ev.* p 210. This section says that oral evidence must be direct. *Kalmther v. Ma Ma*, 3 Bur. L. J. 172=2 Rang. 400. An act of deposing is a physical act which can always be proved by any one who has heard the statement being made, the fact of deposing might be proved by any one who has seen and heard the witness. *Ganapathi v. Sakharayappa*, A. I. R. 1920 Mad. 187=115 Ind. Cas. 147. Hearsay evidence is inadmissible

Sarup v. Emperor, 7 Lah. L. J. 264=83 Ind. Cas. 22=26 Cr. L. J. 1078=26 P. L. R. 566=A. I. R. 1925 Lah. 299.

Evidence of a person who saw it or heard it. "The witness must say what he had 'seen and heard; he was an '*oyant et vaillant*.'" *Thayer, Pre Ev.* 524. Thus a favourite passage, found in several works in the last century, is: "It seems agreed that what another has been heard to say, is no evidence, because

said Hearsay testimony is from the very nature of it attended with all such

rule, and stands or falls according to such other evidential rules as may affect

it. *Greenl. Ev* § 100 But facts except the contents must, in all cases be direct witness that he perceived by his own senses the fact to which he testified " *Steph Intro* p 141 If therefore, A, a witness, had been told something by B, and A were asked what B had told him, the evidence of A would refer to a fact which could be heard, and A is a witness who says he heard it, this section, therefore would not exclude it. *Markby Ev* p 52 A statement made by an accused person immediately after a murder of what the deceased told him is relevant as

Act says that oral evidence must in all cases be direct. If a person by merely

about it, he is giving hearsay evidence. The man who reads out the document to him would certainly be entitled to give evidence of its contents. But another person who reports what is read out to him is giving hearsay evidence, of what would be legitimate secondary evidence were it before the Court. *Kalenthir Ammal v Ma Ma*, 81 Ind Cas 175-3 Bur L. J 17-1 R 1024 Rang 363

hearsay evidence, *Nga v Crown*, *Queen v Kali*, 7 W. R. Cr 2; *Rajoni v Asan*, 2 Cr 25, *Aman Ali v King Emperor*, J 681; *Queen Empress v Nga Ta*, L R 433, *In re Vauthilnqa*, 2 Weir 762 In order to that the com- it is necessary ordance with

s 60 of the Evidence Act *Empress v Arshed Ali*, 13 C L R 125

It is admissible evidence for a witness to re of a family custom, and to state as grounds from deceased persons. But, it must be

the expression of tion of hearsay

P C A person that except the pe *Ev* p 53 So

opinion must be produced. A witness cannot be allowed to say that he has heard another express such an opinion. *Nort Ev* 240.

this novel section, however, makes any book of science published for sale evidence, if the author be dead, or under any of the circumstances specified in section 32, which render his production impossible or impracticable. *Nort Ev* 240 It must be remembered in regard to foreign law that by s 38, certain books are always admissible. *Markby Ev* 53 Under the provisions of the penultimate paragraph of s 57 and of the first proviso of s 60 of the Evidence Act, *Taylor's Medical Jurisprudence* may be referred to. *Hatim v Empress*, 12 C L R 86, *Hurry Churn v Empress* 10 C 143, see also *Howe v Howe*, 25 M L J 594 (F B), *Granade v Com of Calcutta* 2 C W N 745-28 C L J 32=46 Ind Cas 593 But in all c *Purno*, 28 C W N 579

delay or expense. *Cun Ev* 215.

Proviso II. Proviso 2 relates to those cases in which secondary evidence is permitted to be given on account of the great inconvenience or impracticability

ons on walls, monuments, surveyors
s or oral testimony *Mortimer v*
Bolton, 2 Camp 108, *R v Fursay*
arholomew v Stephens, 8 C & P
ones v Turlton, 9 M & W 65 But
written characters exist on some
ts removal for production would be

removable it ought to be pr
Wills Cir Ev 212. In *Joi*
production was required
for
"T
in
up his free-hold
power is given to t
a physical impossibility *Nort Ev* 240.

l down the law thus
the case of things fixed
break
So
not

the interpreter must be called to testify to what B said to him. If, however, u
is a party, when admissions
as B's agent, and the ag
understood by the witness) regarded
language

Telephone communications Evidence as to what a person holding a
conversation over the telephone told the witness was said by the person at the

In any case, the doctrine of admissions may be invoked where one of the
If B had sent

of the requirement of personal knowledge is here out of place, and leads to
unpractical quibbles" *Wigmore* § 669

Market value Testimony as to market value on information derived from
daily communications is not objectionable as being based upon hearsay Testi
mony of witnesses based upon such reports may be received *Chamberlayne's*
Ev § 2708

CHAPTER V.

OF DOCUMENTARY EVIDENCE

Documentary evidence There is practically no controversy as to the
meaning of the word document, because a definition of the term is given in this
Act (*vide s 3 supra*) Stephen defines documentary evidence as "documents
produced for the inspection of the Court or the Judge". *Steph on Ev*, Art 1

Documents being inanimate things, necessarily come to the cognizance of the tribunals through the medium of human testimony; for which reason some old authors have denominated them dead proofs (*probatio mortua*), in contradistinction to witnesses, who are said to be living proofs (*probatio viva*). *Best Ev* § 60 "I" and in many respects in trustworthiness, been noticed from the earliest times, The false relations of what never took

consequence, attainment. *Best Ev*, § 60 "I" er" says *Lumpkin J. of Georgia* in "h than the strongest and most retentive memory ever bestowed on mortal man" "The memory of men as to facts is not satisfying to the mind as a writing, in an investigation involving p. *Bunickarist* ion observed oral evidenc

cases cast upon it, but where the defence is rested upon a written document a release, there is an essential difference, for its genuineness, on the contrary may be shown by many facts and circumstances very different from mere oral evidence; and, moreover, the witness

Rep 705, 706 (*Am*)

Three distinct questions with regard to documentary evidence. There are three distinct questions which are dealt with in the Act in regard to that kind of evidence which is called documentary. First, there is the question how the

s 59 with ss 61 and 64, the result document must, in general, be 'primary evidence,' but there are otherwise Evidence used to prove the contents of a document which is not 'primary' is called 'secondary' *Markby Ev* pp 56, 57

Proof of contents of documents

61. The contents of documents may be proved either by primary or by secondary evidence.

63

Primary evidence

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original

Illustration.

A person
printed at one
evidence of the
the contents of the original

63. Secondary evidence means and includes—

- (1) certified copies given under the provisions hereinafter contained,*
- (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

evidence of its contents
that the thing photo

by a copying machine
it is shown that the copy

evidence of the original, although the
compared with the original

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

Scope of the section 61. "This section lays down that the contents of documents may be proved either by primary or by secondary evidence, and I understand the rule to mean that there is no other method allowed by law for

* See s 76, *infra*.

proving the contents of documents. Section 72 defines the meaning of primary evidence; s. 63 describes what constitutes secondary evidence within the meaning of the Act. *Shunandan Prosad*, 7 A. 738. The rule which exacts original evidence shall be received from some other which is withheld. *Per Parke B in Doe d. Welsh v. Langfield*, 16 M. & W. 127; *Doe d. Gilbert v. Ross*, 7 M. & W. 102, 106; *McDonnell v. Evans*, 11 C. B. 930, 942, *per Alford J.*; *Best Ev.* § 89. *Melius (or Salus) est petere fontes quam sectari*.

hearsay evidence. *Best* § 89. All private documents must be produced, and the execution of the same generally be proved, or their absence must be duly accounted for, and their loss supplied by secondary evidence. *Greenl. Ev.* 558.

instrument is to be proved, the primary evidence is the testimony of the subscribing witness, if there be one. Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is in general admitted. All evidence falling short of this in its degree is termed secondary. The question, whether evidence is primary or secondary, has reference to the nature of the case in the abstract, and not to the peculiar circumstances under which the party in the particular cause or trial may be placed. It is a distinction of law, and not of fact; referring only to the quality, and not to the quantity, of the evidence. It carries on its face no indication of its being primary. And yet if there are circumstances which show that it is not ordinarily primary, it is secondary evidence.

can be resorted to. *Greenl. Ev.* § 84. According to the Indian Evidence Act, primary evidence means the document produced for the inspection of the Court (s. 62). Where a document is executed in counterpart, each counterpart, being executed by one or more parties, is primary evidence as against the party or parties by whom it was executed, and as against the other parties. *Fol. II p. 200*. The following is given by *Lord Esher M. R.* in *“Primary” and “secondary”* evidence, which the law requires to be given first, when a proper explanation is given of the absence of that better evidence.

3. is that the rule requiring the production of evidence, but a rule preferring the thing which is produced to not primary evidence. The other objection term tends to conceal the true nature of the rule's effect. The other objection is that, so far the term is understood to group together all rules exacting a certain quality of evidence when it is available, it groups rules which are in the Attesting united On to clarify the independent

Scope of section 62 Primary evidence means the document itself produced for the inspection of the Court. The fundamental notion of producing the primary evidence is that the terms of a writing must be proved by producing it and not by offering testimony about them. *Wigmore* § 1232. Where the writing constituting a bilateral transaction is executed by the parties in duplicate or multiplicate, each of these parts is the writing, because by act of the parties each is as much the legal act as another. It can make no difference that one party has signed only the document taken

red to
are, 2 Camp. 220, 221
the counterparts of each other, one of

which is delivered to the opposite party, both be considered as originals, one which is preserved may be received in evidence, the one which was delivered." See also *Doe v Putman*, (1842) 3 Q. B. 600, *Colling v French*, 6 B. & C. 398; *Roe v Davis*, 7 East 363. "The earlier practice seems to have been to treat the counterpart of a deed as a copy or secondary as may be inferred from utterances of *Best v J.* in *Munn v Godbold*, 3 Bing 292. There the learned Judge said: "Where there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy. It is prepared with more care than the other copy, and the party who produces it, and against whom it is used, by taking and keeping it as a part of the deed, admits its accuracy. The Courts have therefore always required that if one part of a deed be lost, and another part be in existence, it must be produced, but merely as secondary evidence of the part that was lost." *Wigmore* § 1233; see also *Doe v Wainwright*, 1 New & P. S. *Burchell v Clarke*, 2 G. P. D. 68, *Mathews v Smallwood*, (1910) 1 Ch. 777. Formerly a deed was written on parchment commencing from the middle, the other part was written in a similar way, up

primary evidence of the original document. Thus probate of a will of personal

v Hunt, 6 Ch. D.
2 Ch. 330, and will
contained in a will,
only Pl. in Ex. 711

in *Wainwright v. Poolley*,
applies where
165 *R v Hunt*,

Explanation I. The expressions executed "in pairs" and in "counterpart", in section 62, refer to the mode in which documents are sometimes executed. It is convenient sometimes that each party in a transaction should have a complete document in his own possession. To effect this, the document is written out as many times over as there are parties, and each document is executed, i. e. signed or sealed as the case may be, by all the parties. No one of these is more the original than the other, and any one of them may be produced as primary

Where there are
by each party both
3 K B 706, 721;

Philp Et 7th Ed. 516

paper does not differ from a
an alike, therefore, only be
under such circumstances as
e, if the original is shown

, notice
d copy
Watson,
r better
line at
nber of

in a newspaper,
primary evidence
Chandra v Emf
But if it were

y, but only secondary evidence
conditions which render the
Ev 242 Where the accused
caused 500 placards to be printed and carried away 25 of them for posting, one
of the remainder can be admitted to prove the contents of those posted because
every one of those worked off are originals, in the nature of duplicate originals
The reason
same *R v*
"An order 1
me press, they must all be the
Ellenborough L O J said,
Watson fetched away 25, by

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ould be great weight in the
originals, the manuscript
the same press, they must

carbon copy is no more better signed or executed than a letter-press copy—as a
fact, the signature is not always reproduced on the carbon as it is in the press-
copy letter which is usually copied after signature. But where a document is
executed in counterpart, each party signing only the part by which he is bound,

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each counterpart, is the best evidence against the party signing it and his privies. As to the other party it is only secondary evidence. *Roe v. Davis*, 7 East 362.

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of his father, does not make the document
Hrishkesh, 19 C L J 546-A L I
abstracted in a judgment is not even
cannot be made use of in lieu of

29 Ind Cas 463-60 M L J. 13-A
evidence of a document which is otherwise
ument is lost *Ma Ague v. Maung San Lank*,

A I R 1929 Rang 181 A register containing copies and copied directly from
the originals is legally admissible in evidence in proof of them *Chandram* v
Sheonath, A I R 1931 Oudh 1

document, which is not prove
ever existed A defamatory l

deposed to such a letter ever having been written by the accused *Attia* v
copy of the newspaper was not secondary evidence of the original letter *Ram Lal*

v *King*

question

largely

not be overruled by the Court of appeal except in a very clear case of mis
carriage *Vistanaatha v Bahubai*, A I R 1931 Bom 105-55 ■ 103

s 78 Copies
: sworn copies
examined copy,

in the sense that the original and the copy have been examined or compared
together by the witness, either in his own act of transcription or by taking some

Evidence Act, and are used chiefly to prove
corporations and companies, by laws and the
copy of a Will is admissible in evidence
is proved. *Theli Kicherla* v
Mad 345 47 M L J. 906; *Bo*
certified copy of a document
conditions and contents of it, b
Koeri, 82 Ind Cas 306. A
ment, in which there may be references to it, is not the secondary evidence

of the contents of the document, especially when it appears that it is itself based on secondary evidence of the document given by a party who had this original with him. *Hira Lal v Ganesh Prasad*, 1 A. 106 P. C = 2 I A 61 = 11 C L R. 109.

Clause (2).
evidence *In re*
Re Stephens, L. R.
ton 30 Ir L. T.
secondary evidence,
wish to prove wit-
to the first portion of this clau-
So under this clause a copy

13. This clause is applicable to blue prints
as 212 Ill 89), as well as to carbon copies as it
id of copy than that taken in the copying press
Durr Jones § 209 All that is required under this clause is that the copies must
be made by some mechanical processes which would ensure the accuracy of the

Clause (3) A copy merely as a piece of paper, has no standing as evidence
qualified
as § 1277
as is not
comparison,
or as sometimes, two witnesses, one of whom read the original, while the other
read the copy, or the reverse. But it will save trouble to have the comparison
made by one and the same person
Ev 96, Maung Po v Ma Shu
Kim, 9 C 939 A copy in short,
of a witness. The witness, therefore, must be qualified, and thus the general
principle of witness's qualifications have here certain applications. A general
principle for witness's qualification is that he must speak from personal
it therefore in
own personal
others Upon

copy, is rather in the nature of a rule of preference, requiring first the use of an
immediate copy, if one is available. *Wigmore* § 1274. This view was adopted
by Justice Story in *Winn v Patterson*, 9 Pet 663, 677 where he observed "The

with it, for then it is second remove from the original; or where it is copy of a copy of a record, the record being still in existence by law deemed as high as the original, for then also it is a second remove from the record. But it is quite a different question whether it applies to cases of secondary evidence where the original is lost, or the record of it is not in law deemed as high evidence as the original, or where the copy of a copy is the highest proof in existence. On these points we give no opinion; because this is not in our judgment the case of a mere copy of a copy verified as such, but it is the case of a second copy verified as a true copy of the original." Under section 57 of the Indian Registration Act, (XVI of 1908), all copies of copies given under that section and signed and

admissible for the purpose of proving the

Bhanrao, 78 Ind Crs 865-A I R

2 W R 303, *Smart v Williams*, Comb

ch evidence is thus stated in *Stetson*

v Gulliver, 2 Cush 494, 499 "When the book of the register would be evidence, a certified copy is entitled to have the same effect; there being very little ground to apprehend any mistake from that cause, and upon consideration of the great public inconvenience which would result from having the books of record removed from their proper custody and place of security," *Wigmore* § 1275

According to the orthodox English rule a copy of a copy is not admissible in evidence in as much as in the words of *Alderson B* "there would be no limit to the reception of secondary evidence if that were so. This is but the shadow of the shade" *Ettingham v Roundell*, 2 Moo & Rob 138; see also *Tillard v Shebbe*

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Lochan v Pandit Harinath, 1 Pat 606, *Chinnaji v Dhunkar*, 11 B 320, *Lalsh-*

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the printing of the High Court paper, that before giving the final order for

striking off, it would

A I R 1929 Mad 18

Sanlok v Rameswar,

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Clause (4) Execution in counterpart is a method of execution which is

in itself but supplements the other. *Baiya Nath v. Kamini Kant*, 6 C. L. J. 572; *Andrews v. Harral*, R. C. (1916) 1 K. B. 863.

Clause (5). The oral account of the contents of a document given by some person who has merely seen it with his own eyes but is unable to read it is not secondary evidence of the document; the word "seen" in section 63(5) of the

Ghore and others v. Chatrapal Singh, 12 A. L. J. 239-23 Ind. Cas. 11. So where in order to prove a mortgage the only witness called was an illiterate person he cannot be deemed to within section 63(5) of the Evidence Act 1922 All 232

that under this clause only a witness who has seen the document and who could have read the document in its original state is entitled to give oral evidence of it. *Ramji Das v. Mohan Lal*, 71 Ind. Cas. 651-1923 A. 411. But in *Pudari Singh v. Brij Mangal*, 73 Ind. Cas. 651 it was held that as regards the letting in of secondary evidence the word "seen" in section 63(5) includes also "read over" in the case of a witness who is illiterate and as such cannot himself read it. If it is read over to him it will satisfy the requirements of the section. In *Mohan Lal v. Ramji Das*, 80 Ind. Cas. 939-23 A. L. J. 861, which was an appeal from

v. Chatrapal Singh, supra. After hearing the matter very fully argued we have come to the conclusion with great respect to these two Judges, and we are unable to agree. The critical words in the section are "seen it". The result of the decision would be, for example, that a highly educated person knowing the contents of a document in his own mind and had a person who knew that the English contents and had memory, could not give oral evidence of the contents although he had

exists. The first three sub sections of s. 63 refer to copies made from or compared

that if a person has only seen a copy of a document, there are two chances altogether, and therefore evidence given by him could be of a different category to the secondary evidence allowed by law and a person who has seen a copy

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evidence of the contents of the
L J 172=84 Ind Cas 175=A I
11 D. C. 174 175

Kalender Ammat, 31 C W N 621 (P C)=541
18=100 Ind Cas 1=29 Bom L R 800
Allahabad High Court reported in 22 A L
13 and 73 Ind Cas 651 are no longer good law
the contents of a document by some person
clause means oral evidence by some person who has seen those contents, that
is who had read the document Evidence that the witness only saw the
document and heard it read
contents are concerned an
oral evidence generally, viz,
evidence of a witness who saw
fact which can be seen on
Raghuram, 112 Ind Cas 310.
Statements of persons who
sible in evidence What is required is an oral
judgment or decree by some one who had read

to a document which is
document. *Rati Pal v Uday*

Bhanu, 53 Ind Cas 687 A translation of a document is not secondary evidence
Ambalavana v Kuppachi, 4 L W. 330=35 Ind Cas 20; 26 Ind Cas 618;
see also 70 Ind Cas 107 Where in prior proceedings between the parties
one of them admitted the existence and contents of a mortgage deed, such
admission constituted a good secondary evidence within the meaning of this
clause *Bahadur v Madho*, 36 Ind Cas 696 An objection to the admission
of secondary evidence, if not raised at the time it is admitted, cannot be
allowed to be raised in special appeal Where the plaintiff attempted to
prove the contents of certain documents by oral evidence, but the evidence
fell short of what is required
witness was not properly given
the penalty of the dismissal
of the legal adviser who
24 W R 227 *Surrey*

y evidence of the contents of the
63 or under any other section of the
1020 P C 43

EVIDENCE ACT

Oral evidence cannot
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24 Bom L R P C 565
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66 Ind. Cas 380

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no degrees in the various kinds of such evidence. *Doe v Ross*, 7 M & W.
102; *Hall v Ball*, 10 L J. C P. 285; *Brown v Woodman*, 6 C & P 206;
Jeans v Whedon, 2 M & Rob 486" *Taylor Et* § 550 In *Doe v Ross*, 7 M &
W 102, the question was whether an attested copy of a deed was preferred
in the

evidence "Another
luction of secondary
the law recognises

to the jury, from which back would be a reverse distinction between one case *Mason v. Hill* and the nature of the evidence itself. If you produce a copy which shows that there was an original or if you give parol evidence of the contents of a deed the evidence itself discloses the existence of the deed. But reverse the case, the existence of an original does not show the existence of any copy, nor does parol evidence of the contents of a deed show the existence of anything except the deed itself. If one species of secondary evidence is to exclude another a party tendering parol evidence of a deed must account for all the contrary evidence that has existed. He may know nothing but the origin and the other side at any trial may defeat him by showing a copy the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all. *Wigmore* § 1263. Similarly in *Brown v. Woolman* 6 C. & P. 206 *Parle v. Hill* there are no degrees of secondary evidence. See also *Sugden v. Lord St. Leonards* L. R. 1 P. D. 151, *Brown v. Brown* 27 L. J. Q. B. 173, *Doe v. Cole*, 6 C. & P. 359, *Fisher v. Samula* 1 Camp. 193, *Kensington v. Ingham* 9 East 273 279. But in some of the old English cases the rule laid down was otherwise. In *Ludlam's Will* 10 Ch. 367, *Lord Mansfield v. Lord* 1 C. J. 311. If you cannot prove a deed by producing it, you may produce the counterpart if you can produce the counterpart, you may produce a copy, even if you cannot prove it to be true copy if a copy cannot be produced you may go into the parol evidence of the deed. This rule was also adopted by Lord Hardwicke L. C. in *Omtchen v. Barker*, 1 Atk. 21 (13) and in *Hilliers v. Fishers* 2 Atk. 27. The English law recognizes no preference. But in America in *Prof. Leary* the law recognizes any degrees in the various kinds of secondary evidence and requires the party offering that which is deemed less certain and satisfactory first to show that nothing better is in his power, is a question which is not perfectly settled. On the one hand the affirmative is urged as an equitable extension of the principle which postpones all secondary evidence until the primary is accounted for, and it is said that the same reason which requires the production of a writing if within the power of a party also requires that if the writing is lost, its contents shall be proved by a copy if in existence rather than the memory of a witness who has read it, and that the secondary proof of a lost deed ought to be marshalled into first the counterpart secondly a copy, thirdly the abstract, etc., and, last of all the memory of a witness. On the other hand it is said that the rule is founded on its strength or weakness, and that to carry it to the length of establishing degrees in secondary evidence as fixed rules of law, would often tend to the subversion of justice and always be productive of inconvenience. If for example proof of the existence of an abstract of a deed will exclude oral evidence of its contents the proof may be withheld by the adverse party until the moment of trial and the other side be defeated or the cause be greatly delayed, and the same mischief may be repeated through all the different degrees of evidence. It is therefore insisted that the rule of exclusion ought to be restricted to such evidence only as upon its face discloses the existence of better proof and where the evidence is not of this nature it is to be received notwithstanding it may be shown from other sources that the party might have offered that which was more satisfactory to the jury under all the circumstances. (9) The American doctrine is that if from the nature

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 in *Whitfield v.*
per Loughborough
 on the general rule,
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 the registry system
 an original deed in its
 can be; that a copy
 ginal deeds should be
meath v. Emery, 2
 uts of a writing of any
 out its production, or
 the prisoner or opposite
 B, in *Regina v. Farr*,
 per are, according to the
 per itself, and by that
 (per *Abbott C J*) 2 B &
Leyfield's Case, 10 Co Rep
 it, and to be proved by
 the Court in two manners:
 i law, and the Court shall
 i in material points or places;
 if it was upon conditional
 i And these are the reasons
 i b showed forth to the Court"
 i instrument, the instrument
 r *Coleridge J* in *R v Francis*,
 i not be applied so broadly as
 i is not a document. The rule is

proved by the paper itself and by that
 The rule was so stated by the Judges on
 (*volune*, 2 Brod & H 236 (1821) The only
 the following classes (each of which is dealt
 i document is lost or destroyed. (2) Where it is

64. philosophical and harmonizes better jurisprudence of the age on the subject to curtail and limit the objections to go to the jury to judge of its weight party kept back a more satisfactory have produced and within his knowledge as he had offered, of less certainty, with the jury *Leuts v St Antonio*, 7 Tex 288 (315) (Am) *Wigmore* § 1263

64. Documents must be proved by Proof of documents by primary evidence. primary evidence except in the cases hereinafter mentioned.

Principle A writing is the best evidence of its own contents and must be introduced unless it has been lost or destroyed or its absence is otherwise satisfactorily explained. The reasons are simple long experience They proved literal copy and the the copyist, whether by the copy will may afford the willfulness or by inadvertence this contingency wholly disappears when the original is produced. Moreover, the lack, such features of opponent valuable means the document" *Wigmore* § 1179. In *C J* said that though an original may be liable to the mistake of the transcriber recollection, and the original, the added risk, almost the certainty, exists, of errors of recollection due to the difficulty of carrying in the memory literally the tenor of the document. *Wigmore* § 1179; see also *Slatterie v Pooley* 6 M & W 664; *Doe v Ross*, 7 M & W 102; *Taylor v Riggs*, 1 Pet 591, 596; *Vincent v Cole*, M & M 237; *Macdonnell v Evans*, 11 C B 942

were the beginnings, in the endeavour to give consistency to the system of evidence before juries. They were never literally enforced,—they were principles and not exact rules, but for a long time they afforded a valuable test. As rules

Bliss, 21 N Y p 219, that "it is a universal rule founded in necessity, that the best evidence of which the nature of the case admits is always receivable."

principle was the rule about the rule was older than the have been a generalization from the rule, which appears itself, to be traceable to the doctrine of proof. That ent which was set up in the jury, that a jury had been exhibited to hear testimony from to speak to the contents

of a deed without the production of the deed itself" *Thayer Cas Ev* 2nd Ed 778, 779

Scope of the section "The rule is that the best evidence must be used that can be had, first the original; if that cannot be had, you may be let in to prove it any way, and by any circumstances the nature of the case will admit. This extends not only to deeds, but to records, so far I mean as they may be given in evidence to a jury, for in point of proof it is another thing. But for this

the law requires a proper foundation to be laid, and two things are necessary. First, to prove that such a deed once existed, and there is sufficient evidence that such a deed, to a certain intent, did once exist, by the answer that has been read, which I do not rely on as evidence of all the uses of the deed, but as an admission that such a deed and use something of that nature once existed. The next step is to show some ground that the deed is lost or being in his adversary's hands cannot be come at." *Per Lord Chancellor in Whitfield v Fausset* 1 Ves 357. In *Grant v Gould* 2 H Bl p 101, Lord Loughborough said "that all Common namely, the best evidence agree." The rule, as to the rules of common law, but modified to some extent by the registry system established here by Statute. The theory is this that an original deed in its

Gry 30 (1st) "The general rule was, that the contents of a writing of any document or portable article could not be proved without its production or without showing it to be in the possession or power of the prisoner or opposite party, and on notice to him to produce it." *Per Channell B in Regina v Larr* 4 F & F 336. So the contents of every written paper are according to the well established rules of evidence, to be proved by the paper itself, and by that alone if the paper be in existence. *The Queen's Case* (per Abbott C J) 2 B & 284. The reason of the rule is thus stated in *Dr Liffel's Case* 10 Co Rep 62 (a). And therefore every deed ought to approve itself and to be proved by others—approve itself upon its showing forth to the Court in two manners: (1) As to the composition of the words be sufficient in law and the Court shall judge that, (2) that it be not razed or interlined in material points or places, (3) that it may appear to the Court and to the party if it was upon conditional limitation or power of a revocation in the deed. And these are the reasons of the law that deeds pleaded in Court shall be showed forth to the Court. So when the question is as to the effect of a written instrument the instrument itself is primary evidence of its contents. *Per Coleridge J in R v Francis* L R 1 C C R 128 (132). But this rule should not be applied so broadly as to require the production of any thing which is not a document. The rule is

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well established rules of evidence to be proved by the paper itself and by that alone if the paper be in existence. The rule was so stated by the Judges on the occasion of the trial of *Queen v Cowell* 2 Brod & B 256 (18th). The only exception to with below) in the possession. Where it is insisted on by physical ground is of a public reasons of convenience. *Roscoe Cr Ev 10th Ed p 3*

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Cases in which secondary evidence relating to documents may be given

65 Secondary evidence may be given of the existence, condition or contents of a document in the following cases —

- (1) when the original is shown or appears to be in the possession or power—
 - of the person against whom the document is sought to be proved, or
 - of any person out of reach of, or not subject to, the process of the Court, or
 - of any person legally bound to produce it
 and when, after the notice mentioned in section 66, such person does not produce it,
- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest,
- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable time,
- (d) when the original is of such a nature as not to be easily moveable,
- (e) when the original is a public document within the meaning of section 74,
- (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India to be given in evidence,
- (g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d) any secondary evidence of the contents of the document is admissible

In case (b), the written admission is admissible

In case (e) or (f), a certified copy of the document but no other kind of secondary evidence, is admissible

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents

Principle The contents of a document must in general be proved by a special kind of evidence, called 'primary evidence' but there are exceptional cases in which it may be proved otherwise. *Malib. Ev. 57* The exceptional cases in which secondary evidence is admissible are contained in this section,

But. "That rule which is the most universal, namely, that the best evidence the nature of the case will admit, shall be produced, decides this objection, for expression for the idea that when you lose the best in your power. The case admits of you possess, if the superior proof has been not mean that men's rights are to be sacrificed and their property lost because they cannot guard against events beyond their control; it only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it." *Per Porter J in Thomas v Thomas*, 1 Ld 166, 163; *Higmore* § 1192. The various classes of cases with which the following sections deal are the written or otherwise person, pl or otherwise on the gen

Scope of the section : Secondary evidence of the contents of a document is inadmissible unless the non production of the original is first accounted for so
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for of the non production of the original *Dhurbaneswar v Harisaran* 6 C 720 = 8 C L R 337 (P C), *Rakhallus v Inba Monce* 1 C L R 155, *Imcerunissa v Abedoonissa*, 23 W R 208, 209 (P C) = 2 I A 97, *Waseer Ali v Kalee Kumar* 11 W R 328, *Gour v Hures hishore*, 10 W R 338, *Ishan v Bhyrab*, 5 W R 21, *Estoorun v Mohun* 21 W R 335, *Roopmunoor v Ramlal* 1 W R 145; *Mafee Zoodcen v Meher Ali*, 1 W R 213, *Sheoram v Ramlal* 1 W R 248, *Muhammal Abdul v Ibrahim*, 3 B H C R A C J 160. A writing is the best evidence or destroyed
Clarke & Sall to little more by the intro accounted for entirely differ

ing, rather than a narrowing rule. It meant that the best evidence of which the nature of the case would permit was receivable. It has been pointed out by *Prof Thayer* that this rule has been the subject of a very peculiar development (*Vide the origin of the rule*)

relating to writings only to those which relate to Et § 272 this section and thus is a relaxation

in criminal than in civil. In the former, the original registers of births, deaths, marriages, etc., must be produced and that copies will not be sufficient. *Fried's Ev 7th Ed p 318*; *Whitely Stokes*, Vol II p 92. The exceptional cases in which secondary evidence

requires stricter proof it was decided that, in copy of a document have been used to the possession of the provides for his Where an original document from a Court ought not to be produced, secondary evidence is admissible, but the contents of the *Soukram Sookul v Ramlal*, document from a record must be satisfactorily accounted for before a copy can be looked at and before it can be used. *Nolucal v Nubanal v Nandlal*, 2 W R Act X. 241, *Asman v Doorga*, 21 W R 262.

According to this section the loss of the original must be proved not only in a case where the document is being enforced in a suit but also where it is produced

5. merely as a piece of evidence : *Maqbul v. Baidoo*, 122 Ind Cas 751 = 1930 A L J 765 = A I R 1930 All 539 Where a party relies upon the certified copy of a document before any presumption as to genuineness of the original can be made under s 90 it is incumbent on the party trying to rely upon the document to lay the foundation by leading secondary evidence under s 65 *Gaya Prosad v Jaswanti*, 1930 A L J 1003 = A I R 1930 All 550 = 125 Ind Cas 460

A copy of a disputed document can not be taken as evidence without proof that the original is out of the power of the person producing the copy Admitting the ex
Mussamat the correctness of the copy
 secondary ibundee cannot be admitted as
 absence of

had *Choorun v Ukhunlal*, 21 W R 33

of a letter (neither produced nor called involves the giving of secondary evidence satisfying the conditions required to

Pershad v Amanutulla 26 C 53 = 2 C

rents where sought to be proved by entries made by *Patwari* in his list as the result of his enquiry and inspection of receipts Held that the list would merely
 ents of the receipts and that it was inadmissible

rule out *Baduna Ram v Akbar Ali*, 103 Ind

Cas 752 = 9 Lrb L

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gaged instituted a

only Held that the secondary evidence of the mortgage deed was admissible *Herbert Francis v Mahomed Akbar*, 105 Ind Cas 533 This section provides an alternative to the bond holder in cases where for various reasons production of the original is impossible, but if a bond is in existence production is not dispensed with by

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should not be overruled except in a clear case of miscarriage of justice Production of secondary evidence does not dispense with proof of the execution of the original document : *Chuha Mal v Rahim Baksh*, 71 Ind Cas 563 Where in a suit on bond, loss of bond was alleged and the defendant denied execution

65. *Maung Hmo*, U B R (1897-1901) Vol II, 367, *Sudar Kuar v Chandraiah*, 4 A 330-A W N 1882, 55 *Hualal v Shankar*, 45 B 1170 *Sunni v Sundar*, (1911) 2 M W N 166, *Doramas v D* 87 Ind Cas 332, *Maung Po v Maung Gu*, 101 Ind Cas 193-A I R 1927 R 109 The provisions, made by the Stamp Act for the case of deeds, either unstamped or insufficiently stamped, have no application, when the original deed, which ought to have been stamped has not been produced. It is not permissible to pry penalty or require endorsement by Collector on a copy of unstamped or insufficiently stamped document and to offer the same as secondary evidence of the terms of the original *Venkata v Sri Janganti*, 4 C W N 117; *Aruna Chellum v, Oli gappah*, 4 M H C R 312, *Ragharachari v Rungachari*, 4 Mys L J 147 A distinction must be drawn between the admissibility of the evidence and the manner of proof

Section 65 and Registration Act, s 49 The admitted existence of an unregistered written deed of relinquishment of one's interest requiring registration precludes the proof of the fact of the relinquishment by any secondary evidence as the primary evidence is itself inadmissible under s 49 *Janardhan v Janardhan* 101 Ind Cas 830-A I R 1927 Nag 214 Where a party comes into Court resting his claim on a written title which the law requires to be to register, and is, in consequence and say, 'I can prove my title by have a compulsory Registration ors' *Monmolunes v Bishen Moyee, Sheikh Shuraitoolah*, 1 B L R 58-10 W R 51 (F B); *Gongabisan v Tukaram*, 5 N L R 70-3 Ind Cas 224; *Mahomed v Allah Ditta*, 93 Ind Cas 444-27 P L R 268, *Kallam v Nambiar*, 28 M L J 276 Secondary evidence of a document which is not produced but which in a previous suit was found to be inadmissible as being not registered cannot be given in evidence *Nataraja v Ramabhadra*, 28 Ind Cas 853, see also *Kanduru v Adam Sahab*, 25 Ind Cas 661

Section 19, Limitation Act-Whether acknowledgments lost or destroyed So, to section 20 of the Limitation Act of 1871, writing containing the promise or acknowledgment may be given of the time when it was signed

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which secondary evidence that amongst the ground was the loss or destruction to is the evidence thing was in existence

871 The language of the was necessarily in direct to the Evidence Act, document generally, if the of 1871 oral evidence of the ble in such a case. The words used are When

the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, but oral evidence of its contents shall not be received" One branch of the law of Evidence is that already referred to is contained in 64 and the following section of the Evidence Act and it

determines the cases in which secondary evidence of a document not produced. Another branch of the law is dealt with in the following sections. It deals with the effect of oral communications, may be the effect of a document. The first part of the paragraph before us clearly belongs to the latter branch of the law. And, it would seem the object was to remove any question which might otherwise have arisen whether the rules generally excluding oral evidence as to the date of documents might not exclude oral evidence, where the date is an essential part of the document, and the oral evidence of the date of the document proceeds 'but oral evidence of its contents shall not be received'. These words were introduced with a 'but', and they speak not of secondary evidence but of oral evidence. We do not think they ought to be understood as dealing with an entirely different branch of the law of evidence from the earlier part of the sentence, and as repeating s 65 of the Evidence Act, so far as it relates to acknowledgments. We think the words in question are of the nature of a saving clause, guarding against the supposition that the rules excluding oral evidence further

Wajibun v
Kadir, 13 C 192; see also *Chathu v Virarayan*, 15 M 191; but see *Ziaunnissa v*
Moludev, 12 B 263. This controversy has been set at rest by Act IX of 1908,

detailed record of records, an entry of that statement to be sufficient secondary evidence. *Nowroz*, 5 P. W. R.

1914=16 P. L. R. 1915.

CLAUSE (A).

Original in the possession or power of the Adversary. When a document is in the possession of the adverse party or of some one bound to give up possession thereof to him (e.g. his solicitor) (*Irum v Lever*, 2 F. & F. 269, R. v. *Hunter*, 4 C. (Taplin v Att. *Sinclair v Ste* but not a stake *Gow R* 1191).

in this section are

up possession to his personal custody, or the opponent's demand. *Hignore* § 1200. So wherever it is in the party and he refuses to produce it after a *R v Watson*, 2 T. R. 201, *Makbul Ali v* *Greesh Chunder v Ramlal*, 1 W. R. C. 529 532. The reason why cases equally with civil *R v Elworthy*, 10 Cox Cr 579 582. The reason why secondary evidence is admissible in such a case is thus given by *Buller J.* in *Att.*

65. *Gen v Le Merchant*, 2 T R, 201 note. "It was likewise said, in support of the motion, that the reason why copies are permitted to be evidence in common

does not produce them is in no fault at all, and for that reason a copy is not admitted. But I do not take that to be the rule; it is not produced upon any

sion of the opponent. It is enough if it is in his power to produce it *Parry v May*, 1 Moo & Rob 280. So "the possession of the plaintiff's attorney is the possession of the plaintiff, though they might perhaps be subpoenaed, it is in a party to the suit, it is in *J in Irwin v Lister* of the jurisdiction of

d When a document of the opponent, very recently, the *R v Hunter*, 4 C & P. 128. before notice served be an excuse, at the time of notice, that he had transferred it *Wigmore* § 1200 *contra*, *Wright v Bunyard*, 2 T. & F 193, 194. Before a secondary evidence is admissible under this section, the opponent's possession of the document in question must be shown somehow, *Knight v Martin*, Gow 103, *Whitford v Tuttle*, 10 Bing 395, *Shape v Laut*, 11 A & E 805. Of this fact very slight evidence will raise a sufficient presumption when the documents exclusively belong to him, or regularly ought to be in his custody according to the course of business *Taylor* § 440; see also *Ajoodha v. Esharee Dyal*, 10 W. R. 219; *Eshubanesuar v. Harisaran*, 6 C 720=8 C L R 337 P C; *Henry v. Leigh*, 3 Camp 502. So where a bankruptcy certificate was proved to have been obtained for the defendant, the Court presumed that it had come into his possession *Henry v. Leigh*, 3 Camp 502; *Robb v Starkey*, 2 C & Kir 143. If papers were last seen in the hands of the defendant, it lies upon him to trace them out of his possession *R v Thistlewood*, 33 How St Tr 757. The rule is the same in criminal cases *Perry v May*, 1 M & R 276; *Langton v Reynolds* 18 Jur, 963. The Adversary's possession may also be proved by the admission of his counsel. *Duncombe v Duncombe*, 8 C & P. 222. A party served with notice cannot evade its effect by subsequently parting with the document. *Knight v. Martin*, Gow. R. 104; *Nott* 246. It would seem that when a party has notice

f the evidence is a Rob, 365 is sufficient proof of the contents of a document when the original is shown or appears to be in the possession or power of the person *Salman v. Hakim Mukdam*, A. I R 1928 All 391. This section lays down that secondary evidence may be given, of the contents of a document when the original is shown or appears to be in the possession or power of the person

against whom the document is sought to be proved. This section does not require that in all cases it must be definitely proved that the document is in possession of the other party against whom it is sought to be proved. If long

its contents can be given: *Duarka Singh v. Ramanand*, 41 A. 592=17 A. L. J. 711=51 Ind. Cas. 275; see also *Mussamat Saleha Dibi v. Oudh Commercial Bank*, 20 I. L. C. 111.

of a notice to produce, unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn. *Per Walsh J.* in *Mongra v. Dedi Ram*, 35 Ind. Cas. 328.

Of any person out of the reach of, or not subject to, etc. This clause is out of secondary notice. *Wiseman, L J P. &*

M 109.

According to English law the mere fact of the non-amenableity of the possessor to legal process cannot

possible forms of evidence, by a Court before excusing for non production. If the precise whereabouts of the document is unknown, search may be made; if the possessor be ascertained, he may be requested to appear with the document, or he may be requested to deliver the document for the use at the trial, or his deposition may be taken with a copy furnished by him annexed to it. No one or more of these efforts

to make any such
In the first group,
a nature depending

more or less on the circumstances of the case. *Boyle v Wiseman*, 10 Exch. 647, *Ward v Murray*, 1905, 11 Mes. 5, cited *Philp* p. 548. In the second

v. Gan Kim 9 C 939. So also secondary evidence of a document can be admitted without notice to the adverse party, when the person in possession of the document is out of the reach of or not subject to the process of the Court. *Haranand v. Ramgopal*, 27 C 639 (P. C.)=27 I. A. 1=4 C. W. N. 429. Section 86, of the Evidence Act, lays down that if a copy of a foreign judicial record presume it to be genuine other proof, for under may be given of public person is out of reach

5. of, or not subject to the process of the Court. *Haranand v. Ram Gopal*, 2 Bom L R 562. A notarial copy of a foreign will is admissible on proof by experts that the original is not allowed to be removed, and that the local Courts regard such copies as equivalent to originals. *Phip Ev* 7th Ed 527; *Re Von Liend*, (1896) P 148; *Re Lemme*, (1892) P 89, *Enoch v Wylie* 10 H L C 1, but see *Re Broun*, 80 L T. 360, *Permanent Trustee v Fels*, (1918) A C 879.

As regards the meaning of the expression of "any person not subject to the process of the Court" there is some conflict of opinion. According to Mr. Stokes these words are intended to include a person bound to produce the document on account of his position, and who produces it. *Stokes Anglo Indian Code*, V, C & P 737, *Morston v Dawney*, 1 H & C 31. This clause includes that rule of English

subject is thus briefly
"Secondary evidence is
a stranger to the proceed-
here lawfully refuses to
him either in his own right

or as agent acting on the
of the party who seeks
attendance in Court of the
of *subpoena duces tecum*,
and should lawfully refuse
admissible. *Doe v Clifford*, 2 C & K 448, *Dwyer v Collins* (1852) 7 Ex 632. If on the other hand he attends, but without the document, and a *subpoena duces tecum* has not been served on him or not been duly served, this is a fatal objection to the admission of secondary evidence as the party has not done all that lay in his power to procure the production of the original (*Hibberd v Knight* 2 Ex 11). If the person so refusing is merely agent for another by whose principal does so the Court upon a

the reach of, or not subject to, the process of the Court." So it cannot be said that this clause includes the English rule just mentioned

209; *Huntingdon v. Mildman*, Cro Jack 217; *Wigmore* § 1211. So "where a person is an utter stranger to a deed, there in pleading he is not compelled to shew it" *Buller Nisi Prius*, 252. So if the person possessing the document is by reason of privilege not compellable to produce, there is the same reason for admitting other evidence of its contents as if its production were physically impossible, because the party who stands in need of the evidence which that document affords is not to suffer from its absence at the trial. *Per Pollock C B* in *Sayer v Glossop*, 2 Exch. 409, 410. Mere disobedience is a notice to produce

what is called a *subpoena duces tecum* i. e., a summons to attend the trial as a witness and bring the documents with him (Vide Order 16, rule 1 of Act V of 1908 = s 179 of the Old Code). The person on whom such a *subpoena duces*

tion, penalty, or forfeiture (Vide s 130 *infra*). So a party will not be required to produce the muniments of title to his estates (Taylor § 158, 1164, section 130 *infra*), nor will his solicitor, to whose care they have been entrusted (Hibbert v Knight, 2 Exch 11; Dos de Gilbert v Ross, 7 M & W. 102; Volant v Soyer, 13 C B 231); and in either case independent secondary evidence of their contents may be given. Per Hill J in R v Leatham, 3 E & L 658, 668; Best v § 216. So it is "a well established rule of law" that the productions of a privileged document is excused. Per Hill J in R v Leatham 3 E & L 658, 668. The principal may of course waive his privilege (Wells v Moore, R, & M 390),

is apprehended that no secondary evidence is admissible under the Indian Evidence Act, if the party in possession of the document withholds it under §§ 130 and 131 of the Act

regards this clause Mr. words 'of any person they stand, there is no of the document, as in hardly believe that

this is what was intended. I think it probable that the word 'not' has been here omitted by mistake, and that the case intended to be dealt with here is the

65.

Under rules of strict interpretation it appears that this clause intends to make a departure from the English rule, which does not allow secondary evidence of any document improperly withheld. It may be that the party calling for the document which has been improperly withheld, has its remedy against the party so withholding the document in separate suit for damage or he may be punished for contempt of Court but such remedy may give very inadequate relief where the party withholding is a pauper and the loss to be suffered for the non production of the document is considerable. Moreover that will give rise to multiplicity of suits. It is also not desirable to deprive a party to produce secondary evidence of a document, simply because a third person refuses to produce the original of the document wilfully or perhaps fraudulently. There may be in addition the danger that the party withholding such document has some legal right to the document.

according to *Prof Wigmore*, the rules of law laid down by *Alderson B.* in *James College v. Gibbs*, 1 Y & C 145 156, where he said "You could not have proved it by secondary evidence unless the document had been in the possession of a party not bound to produce it." (The third person refused to produce it is true, at his

to cover a contingency for which no provision has been made in the Act itself.

When
have been
secondary
203, Lord

is a false copy. But the giving of notice is the contemplated danger. The opponent does not produce the original. *Hall*, 14 East. 274, 276, *Le Blanc J.*

given. . . that he may not be taken
Dudley 62, 64. "The answer to this is, first
to guard against surprising his opponent by warning him of the danger.

secondly, that if here the purpose were, to give the opponent time to discover evidence impeaching or confirming the document, the notice should allow time for such an investigation, yet the law is clear that only time enough to produce the document need be allowed; and thirdly, that if, in fact he is not surprised, it is in law still no excuse for not giving notice.' *Wigmore* § 1202 'The true reason' says *Prof. Wigmore* "that which is naturally deducible from the proponent's situation. He is required to produce the document if he can; he says that he will not bring

with the request. If we translate ly appreciate the significance of the and this notice of demand is necessary, in *Biron Parke's* words, (in *Dwyer v Collins*, 7 Exch 639) 'merely to exclude the argument that the party has not

shown that by giving notice to that adversary to produce it, he has used every exertion in his power that the best evidence might be given" So where a document of title which is in possession of a party is not produced by him after notice to produce the same, the party giving notice is entitled to give secondary evidence of the document under s 65(b) and section 68 proviso 2 *Narsidas v Ravi Sankar*, A I R 1931 Bom 33; see also *Abdul v Kishan*, 11 Lah L J 401, *Makhan Lal v Gavinda*, 13 R D 718; *Subrayulu v. Vengama*, A. I. R 1930 Mad 742-123 Ind Crs 197; *Wigmore* § 1202, see also *Maungsan* to ere be 90. age ought to be, denies that he has it, secondary evidence is admissible *Taru Mal v Zulphakar Sha*, 49 P R 1832 The word "produce" only means "procure the production or give it in evidence" *Gaya Prosad v Jaswant*, 1930 A L J. 1003-125 Ind Cas 460-A I R 1930 All, 550

CLAUSE B

Written admission as to the contents of an original document Section 22 lays down that oral admissions as to the contents of a document are not

proof of a document even though the original is in existence, and might be but is not produced *Cum Do* 221 The result seems to be this—The written admission may always be proved The oral admission can only be proved in

65. condition mentioned in cl (b) of section 65, be admitted. *Safar Ali v Mohesh*, 23 C L J 122=34 Ind Cas 956 In a suit for redemption of mortgage, the mortgage deed was not produced. Secondary evidence consisted of a document addressed to the mortgagors by the alleged agent of the mortgagee, which proved to liability mortgagee, rting to be his. It was mortgaged deed under s 65(b), secondly, to save limitation under section 19 of the Limitation Act. Held that the document was no secondary evidence of the existence of the mortgage as it did not fall within the category of writings described in clause (b) of section 65 of the Evidence Act. *Gayraj v Balraj Ali*, 20 Ind Cas 62. This clause has no application where the original document is inadmissible for not being registered or properly stamped. *Dnethi v. Krishnaswami*, 6 M 117; *Sambayya v Ganaayya*, 3 M 308, *Damodar v Attimaram Babaji*, 12 B 443 (446). Where the record of the statement of the accused is not admissible, secondary evidence thereof could not be given. *Queen Empress v Viram*, 9 M 224. In rejecting such evidence, *Parker J* at p 240 observed: "Reference is made by the Sessions Judge to s 65 of the Evidence Act, the words appearing in cl (b) in that section being quoted; but for the reasons above stated, I am of opinion that it was not writing—if the affixing be held to constitute a contents of the previous statements."

CLAUSE (C).

lost or destroyed. The loss or destruction of opens the door for the admission of secondary evidence. *Levy's Lb* 274. This rule is a very old one. In 1611, in *Dr Leyfield's Case*, 10 Co Rep 92 (a)=Wig. Cas 233 in admitting secondary evidence in such contingency, the Court observed: "yet in great and notorious extremities, as by casualty to fire, that all his evidences were burnt in his house, there, if that should appear to the Judges, they may, in favour of him who has to great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not extreme whenever equally slowly where."

Anon, Jenkins J In ti charters have been los

2 Keble 546; *Underhill* 8; *Robinson v Davis*, 1 v *Melhuish*, AmbL 24 *Villers*, 2 Atk 71, Lord

Wuzer Ali v Kala Coomar, 11 W R 228; *Rajendra v. Behari*, A. L. R. 1932 Pat 157; *Abheraj v. Gaya*, 8 O. W. N 1228. But secondary evidence is admissible where the Court is satisfied that the original is lost or destroyed. *Hurish v Prosunna*, 22 W R 303, *Syed v. Nuseebun* 10 W. R. 24, *Lukhimon v. Koruna*, 3 C L R 509; *Khelster Chunder v Khelster Paul*, 5 C 886=6 C L R 199; *Jaffree Khanum v Imdad*, 2 N W. P 314; *Woomesh Chunder v Sam Sundari*, 7 C. 98=8 C. L. R. 189; *Syed Abbas v Yadeem*, 3 M L A 156;

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Now the
unavail-
evidence is
destroyed

Amerunnisa v. Afadoonnis, 15 B L R
A. 87; *Sheo Sarun v. Goolkaur* W R.

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Suraj v. Lord St Leonard, 1 P D 151; *Rance v. Hirdyal*, W R (1861) 301;
Ranjit v. Chumtal, 1 N. W P 178; *Bishambhar v. Emperor*, 90 Ind Cis 706=
2 O; *Marakarutti v. Venkutt*, 16
M 67 Cas 660; *Gopi v. Mahanandi*,
12 M 21 L W 227=97 Ind Cas
785=A I R. 1926 Mad 1001; *Tulsi Ram v. Ram Saran*, 23 A L J 109=

known and that fact may be recognised
telegrams are destroyed after three months
secondary evidence is admissible *Bishambhar*
v. Emperor, 2 O W. N 760=90 Ind. Cis 706 If it is found that a
document has been lost evidence may be given and whether proof is sufficient
in a case is a question of fact *Bibi Suga v. Angad Gir*, L R 1 A 201.
But a mere assertion of destruction that a document is lost without any
sufficient ground for admitting secondary
evidence is not sufficient. 3 A 539 Where the explanation for the
loss is lost, the regular course is to prove

the loss before tendering secondary evidence *Surat Singh v. Rani*, 59 Ind
Cas 461 In ordinary cases if the witness in whose custody a deed was, should
depose to its loss, unless there is some motive suggested for his being un-
truthful, best evidence should be accepted as sufficient to let in secondary
evidence of the deed *Phirsham v. Ianna* 21 O C 272=48 I A 365 P C

of such
s 1006
insist-
power-
Dayal,

and Cas 399 But the question whether or not sufficient proof of search for,
or loss of, an original document, to lay a ground for admission of secondary
evidence has been given, is, a point proper to be decided by the Judge of first
instance and is treated as depending very much on his discretion and his con-
clusion should not be overruled, except in a clear case of miscarriage *Ma Path*
v. f filed a suit on
have been lost and
was not lost but
suppressed as there was an payment of

A L J 265=18 Ind Cas 878

word "instruc-
tion" merely that it
the two come
moment that the
destruction becomes questionable at all (s e when not proved by eye witnesses
of burning or tearing, the inquiry is raised whether the search for it has been

5. sufficient; and, in the next place, the proof of a loss usually carries the implication that the thing not found has ceased to exist, and thus assimilates the case to one of destruction. Thus the great question to which so many Judges have devoted so much pains—the establishment of a test for the sufficiency of proof of loss—includes practically not only the cases, of loss in the narrower

and important document which the party might have an interest in keeping, and for the non-production of which no satisfactory reason is assigned . . . where the loss or destruction of the paper may almost be presumed very slight evidence of its loss or destruction is sufficient" *Per Abbott C J in Breuster v Scuell*, 3 B

never likely to be required for any purpose whatever. In the former case reasonable to exact proof of a very careful search, whereas in the latter very slight evidence tending to show loss or destruction will suffice. *Will Es 2nd Ed* n 208. What is proper search or enquiry must depend on the particular

surrounding circumstances of the particular matter before the Court. A paper of considerable importance, which is not likely to be permitted to perish may call for a much more minute and accurate search than that which may be considered as waste paper, which no body would likely take care of. . . What inquiry will do? I think, in cases of this sort [there the loss was

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the
where it ought to be found" *Per Pollock*
W 319 329. In the same case *Alderson*
has been a loss, and whether there has
much on the nature of the instrument searched for. If we were speaking of
envelope, in which a letter has been received, and a person said, "I have searched
for it and
with the
party who
to be it
it has been taken
It has been taken
ought to go to
away. A
would be satisfied
itself; and the
contents of this
document by
the original" *R v Morison*, 4 M & S 45, *Gully v Exeter*, 4 Bing 200, 21
C B N S. 747, 750, *R v*
W 269; *R v Gordon*, 25
ully as to exclude every

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suggests and which were made

st. 378; *R. v East Fairley*, 392—1896) Vol II, 347. If circumstances tending to the most rigid enquiry should be made into the reasons for its non production *Johnson v. Aruine, supra*. It follows, properly, that the determination of the sufficiency of the search and in general of the proof of the fact of Court's discretion *Wigmore* § 1191 evidence of the search of the originals, are admitted. Whether or not sufficient proof of search for or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of the first instance, and is treated as depending very much on his discretion. His conclusions should not be overruled except in a clear case of miscarriage *Haripria Debi v. Rukmini Debi*, 19 C 438—1911 A 79 P C. *Chotram v. Ahem Chand*, A I R 1929 Sind 7. In *R v Kent north*, 7 Q B 612, 649, *Denman L C J* said: "I think that we collect from *R v Morton*, the only rule, namely, that no general rule exists. The question in every case is, whether there has been evidence enough to satisfy the Court before which the trial is had, that to us the words of *Byrley J* in *R v Denton*, 'a bona fide and diligent search was made for the instrument where it was likely to be found'. But this is a question much fitter for the Court which tries than for us. They have to determine whether evidence is satisfactory, whether the search has been made bona fide where there has been due diligence, and so on. It is mere waste of time on our part to listen to special pleading on the subject." *Wigmore* § 1191, *Ma Nyeu v. Yauu*, U M R 1897

proof was given of search, cannot be received as secondary evidence *Meer Usudoolah v. Beeby Imamman*, 5 W R P C 20—10 M I A 19, see also *Roopmanyoores v. Hamlal*, 1 W R 144; *Pandu v. Bapudas*, A. I R 1929 Nag 288

Non production for any other reason. The question whether the non-production is due to any other sufficient reason not arising from his own default or neglect is one of fact and depends mainly on the discretion of the Court, *Gaya Pros d v. Jaswant*, 125 Ind Cas 460—A I R 1930 All 550. The certified copy of a document which is already filed in another Court and cannot be produced without unnecessarily delaying the trial of the suit is admissible under s 65(c) *Jobeda v. Monabali*, 130 Ind Cas 860—A. I R 1930 Cal 479

CLAUSE (D)

When the c

6 M & W 68

also be proved

be produced in Court *Taylor* § 438, see also *R v. Farsen* 6 C & P 81 *Cohen v. Bolton*, 2 Camp 108, *Doe v. C* 8 C & P 728, *Bruce v. Nicolopolo* 1

bringing a notice into Court." A remarkable illustration of this rule was furnished in the case of a man, who fell of the Liverpool goal, on mere Lord Abinger in *Martimer v. McCallan*, must show that the writing cannot be produced in Court. *Jones v. Farleton*, 9 M & W. 675—11 L J, Ex 267. Evidence has been admitted of the inscription

65. on a will or a tomb stone giving the date of death *Smith v Patterson*, 95 Mo 525=8 S W 567; *Bruce v Nicolpolo*, *supra*, *R v O'Connell*, 5 St. Tr N S 241. If there are stone itself may have to be produced; *Davidson*, 13 Q. B. D 265. There is a that the Court may readily asume that they cannot be produced in Court, and as to which secondary evidence may be allowed, such as inscriptions and addresses on travelling trunks. If the produce found is indispensable, it would sign were painted on a house, it would have to be produced, nor can it be for wagons, boxes, tombstone, and the like, on which one's name may be written *Kansas etc Rail v Miller*, 2 Colo 440, *Burrell v North*, 2 Cr & K 679. While Courts, in the administration of the law of evidence, should be careful not to open the door to falsehoods, they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labour and expense to the parties, and delay the progress without giving any additional safe guard *ited States*, 3 Wall. (U S), 114; *Burr* on a coffin plate, the coffin plate should be produced as it is removable. *R v Fife Wills Cir. Ev 5th Am Ed 212*. says Mr. Taylor "and the ut its removal, secondary that case, as in the case of mural inscriptions, it is not in the power of the party to produce the original" *Alton v. Farmial*, 1 C M & R 227, 291, 292; *Boyle v Wiseman*, 10 Ex R. 647. *Taylor* § 438. Mr. Whitley Stokes thinks that such a case is not provided for, unless perhaps by the latter part of clause (c). But it can hardly be said that the original cannot be produced in reasonable time when it cannot be produced at all. It seems that the case would fall under paragraph (iii) of clause (a), in as much as it is in the power and possession of a person who is out of the reach and not subject to the process of the Court. *Woodroffe Ev 5th Ed. p 519*. Secondary evidence, of the abstract which by section 32 of the Factory and Workshop Act, 1901 (*Edw 7 C 22*) must be affixed in the factory, can be given as the original cannot be removed. *Owner v Beehive Spinning Co Ltd.* (1914) 1 K B 105=83 L J K B 292, *Mortimer v McCallan*, 6 M & W 53. Under this clause any kind of secondary evidence is admissible.

CLAUSE (E)

When the
record under
this clause In

Lal, 14 C 491. This excep-
Mark Ev 57. In *Hannell v*.
"The admission of copies

practice and besides the documents might be wanted in different places at the

you cannot remove the document in which the writing is made, you are entitled to the next best evidence." *Per Abinger L. C. B in Mortimer v McCallan*, 6 M. & W 53, 59, 11 *ignore* § 1218.

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O W V.

(1) in the matter of *Adya*, 11 Ind Cas 261.

An entry in a public document such as a settlement record can be proved only by the original
A I R 1923 Lah 150
tenant

Cham Das,
evidence
L J 659.
from some

Nadha Nath v Empt
It is doubtful whether
record in the Revenue Court is admissible in evidence *Bhaquati v Marjard*,
A I R 1931 Oudh 136-129 Ind Cas 331-7 O W N 1079.

CLAUSE (F).

secondary evidence of the contents
a document of which is certified
as law in force in British India

instance without having been introduced by any other evidence *Havish v*
Prosunno, 22 W N 200
a certified copy
India to be given
Hazari Lal v
Cis 50
Cis 752

Section 57 of the Evidence Act provides that a copy of a document under that
section shall be admissible for the purpose of proving the contents of the
originals, but that clause was not intended to override the provisions of the
Evidence Act.

admissible in evidence *Sansa Rao v Ghani*, 13 C P L R 91 The issue of
a certified copy of income-tax returns to a person not entitled to inspect is
forbidden by s 57 of the Evidence Act.

65. This clause only allows certified copies as secondary evidence. But when the original is lost or destroyed any secondary evidence is admissible. *Hunnath v Vajoth*, 6 M 80, *In re Aia and the Breuhildu*, 5 C 583, *Chandresuar v Bisheswar* A I R 1927 P 61=101 Ind Cts 239=5 P 777, *Hiranand v Ram Gopal* L R 27 I A 1=27 C 639 P C; *Ananda v. Secretary of State*, 43 C 973=20 C W. N. 573. Other secondary evidence is also admissible where the document satisfies the condition of the next clause. *Ram Sundar v Chindresuar*, 34 C 293.

CLAUSE (G).

When the original consists of numerous documents. This provision is for the saving of public time. If the point to be ascertained were, for instance, the balance in a long series of accounts in a merchant's books evidently great inconvenience would arise, and much public time will be wasted, if a witness were and to make his examination *Beeling*, 3 Camp 310. He is sworn, and then to give the *Phil Ex* 499 *Taylor* § 462.

where the books and documents are multifarious and voluminous and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements. In a trial embracing so many details and occupying so great a length of time as the case at bar, during which a great mass of

it was the only mode of attaining the jury" *Wigmore* § 1230. The principle is that by which the

state of pecuniary accounts or other business transaction is allowed to be shown by a witness's schedule or summary. *Meyer v Sefton*, 2 Stark, 274, 278; *Gardner*

rahaw, 1 De G & Sim 280, of copyright, the material presented in such a way as

to be conveniently compared. *Leurs v Fullerton*, 2 Beav 6, 8; *Maxman v Tegg*, 2 Russ 385, 398, *Wigmore* § 1230. A witness may speak as to the insolvency of a party at a particular time from an inspection of his books. *Meyer v. Sefton*, 2 Stark 274. This exception however, will not enable a witness to state the general contents of a number of letters received by him from one of

the parties in the cause, object of the examination be they produced on his mind between the writer and a third party. *Taylor* § 462. 'So a witness' the parties, though he may not be allowed to speak in the general

Lord Keayon in Roberts v Lums, etc. as to summary testimony. *Prof Wigmore* 'require, as a condition, that the mass thus summarily testified to, shall, if the occasion seems to require it, be placed at hand in Court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or

any person who has examined them, and who is skilled in the examination of such documents. In *Ram Sundar v Chandreswar Prosad*, 11 C W N 501=34 C 293, the Court observed "This objection is founded on the fact that the witness who had examined

embodied the results of their examination of the records and registers. The objection made by the learned Counsel for the Appellant is that the Collectorate, under the provisions of the Act, is not bound to preserve the documents, and the learned Judge has found as a matter of fact that those documents could not be conveniently preserved.

Evidence Act, then the only secondary evidence which could be admitted was
the certified copies of the documents in question. We do not agree with the
^{mem} . . . We think the
. . . mitted and for
. . . not because the
documents were
use the fact that

documents. That being so, the general result of the documents examined by the learned Judge was given by the Record keeper and the clerks who give evidence before the learned Judge. An Abstract of mutation records is admissible under the section *Sher Mohammed v* 18 Ind Cas 451. Evidence may be given when they consist of numerous *lanungoes* entertained to assist the use of the Records, yet it is an abuse of their functions to require them to give oral evidence of the contents of a document such as record of a *Muafi* enquiry which ought to be examined in original by the Court itself. *Gilani v Mussamat Hussan*, 2 Lah L J 714.

66 Secondary evidence of the contents of the documents

Rules as to notice to produce. referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is * [or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it —

- (1) when the document to be proved is itself a notice ;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it ;

*These words in section 66 were inserted by the Indian Evidence Act Amendment Act (18 of 1872) s. 6

- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

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embodies the law of notice, which can be received under section 65, section 34 of Act II of 1855 which section 65 (a), namely, that where the document was out of the reach of the process of the Court. Taking this section with clause (a) of section 65, notice must be given where the document is in (a) the possession or (b) the power of the person against whom it is sought to be possession of a person legally bound to where a person is out of the jurisdiction of, arising

order, cases in which the rule of notice is satisfied, cases in which, by exception, § 1202 Where it is in the hands of the a order to lay the foundation for secondary evidence is reasonable to produce it *Bradford's Case*, Case 24 in Clayton's Rep = *Thayer Cas. Ev.* p 780 In *Salern v Mehresh Ambler* 247, Lord Hardwick in allowing proof by a copy said: "There be given of the contents of deed in the hands of and does not . . . The rule of the

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proved in itself a notice to quit, . . .
(2) where from the nature of the action the defendant has notice that the p intends to charge him with possession of the instrument, as for example, in trover of a bill of exchange *Jolley v Taylor*, 1 Camp. 143; *Scott v. Jones*,

P. 113 (3) Where the adverse party
 indulently, as where, after service
 had received paper from the witness
 in fraud of the subpoena. *Leeds v. Cook*, 1 Esp 256, *Nally v. Greenough*, 25
 N. H. 325. (4) Proof that the adverse party or his attorney, has the instrument
 in Court, renders notice to produce it unnecessary. *Dwyer v. Collins*, 7 Lach.
 639 (5) Similarly no notice is necessary where the adverse party or his
 agent admits the loss of the original. In such a case the party will be
 admitted to give secondary evidence of its contents. (6) Similarly if the
 writing is in the control of a third person without the jurisdiction of the Court,
 no resort to legal force is of service. *Green v. Le* § 563(e) The above rules
 are applicable both in civil and criminal cases. It will comparatively seldom
 happen that documents are required to be produced at a criminal trial, and
 1 *Nort* L. 251 Where
 a letter, which was neither

Each partner should be served with the notice contemplated by s 60 of
 the Evidence Act to produce such accounts and papers as may be in his
 custody. If he omits to produce the books and the books that are proved to
 be at the time in his custody or under his control the presumption recognized
 in illustration (8) to s 114 of the Evidence Act may be applied. *Pulin Bihari*
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dispensing with the notice can operate to make it admissible *Prafulla v.*
Emperor, A I R 1930 Cal 209=50 C. L. J 593

Secondary evidence of the Contents 'Secondary evidence of the con-
 tents' means apparently "not of the existence or condition of the documents"
Whitley Stokes, Vol II p 893

Party—Meaning of The word 'party' means not only adversary in the
 cause, but also a stranger 'legally bound to produce' the document *Whitley*
Stokes, Vol II p 893

Such notice to produce as is prescribed by Law According to English
 practice an adversary in the cause is given a notice to produce the document in
 direct case

be served with a
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 1 on either *Att*
 3 & P 394 But
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drimmer, M & M 334, *Byrne v Harvey*, 2 Mo & Rob 89 But as to the time and
 place of the service no precise rule can be laid down, except that it must be such

party desiring to use it, until he has by subpoena duces tecum resorted to the

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hold that in an action of trover for bank notes no notice to produce the instrument is required. These principles apply directly in this case. The form of pleading, we must had in his possession, found then to be (N. Y) 293; see: Cr. 379 (582)

of papers, (*Jolley v Taylor* 1 Camp. 143); in an action to recover the value of papers, (*Luckett v Clark*, 10 Cox Cr. 379 (582)). If the maker of a note or cheque, or the acceptor, in an action, deny by the

D 446) In an action in contract it is held that the pleadings imply notice to the orders and letters constituting the contract. *Zipp v Colchester*, 12 S D 211 (Am). So the rule is the same where the writing is a proper matter of defence and the adverse party must understand that it will come in question (*Kelner v S*).

possession;

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passing, or delivery is of the same kind with the others which he has disposed of or retained in his possession, he had notice in effect that if practicable to procure it, evidence will be given of their counterfeit character and of having passed them as true. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is not in form; notice in law is notice in effect, and either is sufficient. *Per Baldern J in I S v Dudley*, 1 Bold W 519, 524 (Am). It seems settled therefore, that on a charge of larceny or of forgery no express notice is necessary; and the principle would also extend to other charges; but the nature of the charge will determine the application of the principle. *Wigmore* § 1205 *R. v. Haworth*, 4 C & P 251, 256. But in an action for arson with intent to defraud the insurer, notice to produce the policy was required. *R. v. Atkinson*, 6 C. & Cr 153, see also *R. v. Elworthy*, 10 Cox Cr. 379 (582). If the maker of a note or cheque, or the acceptor, in an action, deny by the

4 Taunt. 865; *Bucher v. Jarrat*, 3 H & P. 113. (3) Where the adverse party has obtained possession of the document fraudulently, as where, after service of a subpoena duces tecum, the adverse party had received paper from the witness in fraud of the subpoena. *Leeds v. Cook*, 1 Esp. 256; *Nally v. Greenough*, 25 N. H. 325. (4) Proof that the adverse party or his attorney, has the instrument in Court, renders notice to produce it unnecessary. *Dwyer v. Collins*, 7 Exch. 639. (5) Similarly no notice is necessary where the adverse party or his agent admits the loss of the original. In such a case the party will be admitted to give secondary evidence of its contents. (6) Similarly if the writing is in the control of a third person without the jurisdiction of the Court, no resort to legal force is of service. *Green v. Ly* § 563(e). The above rules are applicable both in civil and criminal cases. It will comparatively seldom happen that documents are required to be produced at a criminal trial, and notice will consequently have but seldom to be issued.

section 65 of the Evidence
although no objection was
made, 26 C 53-2 C W N

Each partner should be served with the notice contemplated by s 66 of the Evidence Act, 26 C 53-2 C W N. The notice should be in custody of the partner as may be in his books that are proved to be at the presumption recognized in illustration (8) to s 114 of the Evidence Act may be applied. *Pulin Bhatia v. Mohendia*, 31 C L J 405. Before secondary evidence of any document can be given, a notice to produce must be given. *Shue, 2 Rang* 397- of a letter neither called for or produced. No objection may be taken to the giving of that evidence, and no subsequent dispensing with the notice can operate to make it admissible. *Prafulla v. Emperor*, A I R 1930 Cal 209-50 C. L. J 598.

Secondary evidence of the Contents—Secondary evidence of the contents means apparently "not of the existence or condition of the documents" *Whitley Stokes* Vol II p 893.

Party—Meaning of The word "party" means not only adversary in the cause, but also a stranger 'legally bound to produce' the document *Whitley Stokes*, Vol II p 893.

According to English law, the document in question must be served with a notice to produce. The notice must be served on either the party or the person in possession of the document. But the notice must be served to the time and place specified in the notice, and it must be such as to enable the party, with the call *Rogers*.

as to enable the party, with the call *Rogers*.

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party desiring to use it, until he has by subpoena duces tecum resorted to.

36. power of the law to obtain it; so that the mere fact of the third person's possession, or of notice to him, or

In India the procedure for Criminal Procedure Codes (*Vide Civil Pro Code, Order XI rules, 15, 16, 17, 18 and Order XVI, rules, 5, 8, 7, 8, 9, 10, 18, Criminal Procedure Code, ss 94 to 98, 485*) In the original side of the High Court where the English practice is followed, a subpoena duces tecum *offe Ex 8th Ed 523* will be served as the Court

"It may be difficult to lay down any general rule as to what the notice

be dangerous to do so since if any material errors were to creep into the parti-

Lawrence v Clark, 14 M & W, 250 Notice to produce 'all letters written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person on their behalf; and also all b

(*Morris v.*

defendant, *see* *Rob 33*); and also "all accounts relating to the matters in question in this cause" (*Rogers v Constance*, 2 M & Rob 179) have been held sufficient notice to j

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While a person is not required by this section to produce documents required by him instead of on the woman herself would constitute notice required by this section *Dingawan v Jagannath*, A. I R. 1929 All 680

the jury *see* *Do v Baudges v* declines to use the will not make them 10), though it is otherwise *Wilson v* 5 Notice to produce and a witness as to their contents. *Graham v. Dyster*, 2 Simk 23. If a party refuses he cannot

o contralict the secondary proof (*Doe d.* 135) or to show that there are attesting *Challias*, 7 C II 413; or to refresh the memory of a witness (*Hill v Ainsworth*, Bristol, 1817); or it seems, for any purpose (*Collins v Garbon*, 2 F. & F. 47, *Doe v. Hodgson*, 12 A & L 135) He is in effect bound by any legal and satisfactory evidence produced on the other side. *Shookram v. Ramlal*, 11 W. R. 248; *Nort Ev* 252

proved is itself a notice. a copy 'The reason *Slaymaker*, 14 S & R Pa 153, 156 (1m) "Every written

ing" *Wigmore* § 1206, see also *Phillipson v Chase*, 2 Camp 111. But this consideration can well be made in the notice to produce In England,

quit *Ibid* There also this exception in regard to notices to produce, for the

character of because it re of the document 34; *Taylor* red for a ature of a me be a mere notice". *Grote v Ware*, 2 Stark 174 A notice of a bill's dishonour was held to be a notice *Ackland v Pearce*, 2 Camp 599 But in case of a ice was re R 261, See also iso notices produce),

most Courts from time to time recognize that the case of a notice—notice to quit, notice of dishonour, notices of suit, and the like—is to be governed merely by the general principle namely, where the pleadings by implication give notice to produce the notice, no express notice to produce it is necessary; but otherwise it is required *Wigmore* § 1209

Proviso—para (2)— required to produce it the form of the pleadings, the possession of an in produce need be served upon him *Callan v Freueck*, 6 B & C 398, 399 "Where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice" *Per LeBlance J in How v Hall*, 14 East, 274, 277 This principle is accepted in a variety of cases *Wigmore* § 1205 It naturally suggests itself that there are cases in which formal notice to produce would be idle, as in the case of an action for wrongful detention of a document belonging to the plaintiff, although, strictly speaking, such an action would be for the material on which the written character appeared, and it is account that the general

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(*Kelner v. Sarage*, 20 Me 199), or the action is brought on a written contract in possession of the defendant which is fully described in the complaint *Dana v. Conat*, 30 Vt 246; *Burr Jones* § 223. 'If the note, he is charged with forging, passing, or delivery of the same kind with the others which he has disposed of or retained in his possession, he had notice in effect that if practicable to procure it, evidence will be given of their counterfeit character and of having passed them as true. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is notice in form, notice in law is notice in effect, and either is sufficient," *Per Baldwin J in U S v. Doebler*, 1 Bold W 519, 524 (Am). It seems settled therefore, that on a charge of larceny or of forgery no express notice is necessary; and the principle would also extend to other charges; but the nature of the charge will determine the application of the principle. *Wigmore* § 1205 *R v. Hanorthy*, 4 O & P 254, 256. But in an action for arson with intent to defraud the

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Maun, Po v. Ma Shice, 81 Ind Ca 373=A. I. R. 1925 Rang. 7; *Ma Le v. Ma Shice* U B R. 1907. 4th Qr Ev 13, but see *Dinonath v. Rama Rai*, 6 P. 102-97 Ind Cas 348-1926 P. 512. In another case it is held that in a suit for redemption when the mortgagee is in possession of the mortgage deed, and fails

to produce it, oral evidence is admissible under s 65 (a) read with proviso (2) to section 66 of the Evidence Act. *Mt Amin v. Mt Gurh*, 9 Bur L T. 52-31 Ind. Cas. 692; see also *Bahadur Singh v. Mahadeo Singh*, 36 Ind. Cas 696; *Sahai v. Sheo*, A. W. N. 1888, 117, *Dicarka v. Ramanand*, 11 A 592-51 Ind. Cas 275-17 A. L. J. 711.

No notice to defendants to produce the original was necessary to render secondary evidence admissible, where the defendants, from the nature of the case, were required to produce the original. *Syed D* It is doubtful if a *pro forma* defendant is bound to produce the original, or in the decision of the case is not an adverse party within the meaning of proviso (2). *Durgabati v Jagannath*, A. I R 1929 All 680.

in fraudulent possession of a document in his third person (who thus is not bound to produce it from the requirement

object of a notice is amounts to a refusal.

Thus in *odium spoliatoris*, a notice need not be given to the adverse party to produce a paper, of which he has fraudulently or forcibly obtained possession, and of a he same to party as once counsel for party

by the adverse means of any taining a deed Mass 284) or *ly v People*, 49

A defendant signed by the he received at the plaintiff, paper produced

did not contain the whole of the letter as written, and that something material had been cut off from the top. It was not necessary for the plaintiff to give notice to produce the other letters. *Robinson v Cutter*, 163 Mass 377, *Burr Jones* § 228.

Proviso,—para (4)—When the adverse party has the original in Court A proof that the adverse party, or for the object of the notice 1 C M & R 38, *Cook v Patridge*, *ibid*) testimony to to produce it

it be likes, at the trial, and this to secure th Taylor § 456 In *Dwyer v Collins*, 7 Ex Ch indorsees against the acceptor of a bill of pleaded, *inter alia*, that the bill was given to prove his plea, and before the Lord Chief Baron, the defendant proceeded to prove his plea, and

Lord Chief Baron, after consulting the Judges ruled that the defendant was not bound to produce the original.

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In that case Lord Chief Baron Parke said "The next question is whether, the bill being admitted to be in Court, parol evidence was admissible on its non-production, or whether a previous notice to produce was necessary. On principle the answer must depend on the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to explain or confirm it, then no doubt a notice at the trial though the document is not produced is permitted to make use of secondary evidence."

he must do before he can be permitted to make use of secondary evidence. The demand for the production of the document must be true reason, the measure of time necessary to procure the evidence to explain or support it, a very complicated one, depending on the nature of the plaintiff's case and the document itself and its bearing on the cause, and in practice such matters have never been inquired into but only the time with reference to the custody of the document and the residence and convenience of the party to whom notice has been given and the like. We think the plaintiff's alleged principle is not the true one on which notice to produce is required but that it is merely to give a sufficient opportunity to the opposite party to produce it and thereby secure if he pleases the best evidence of its contents, and a request to produce immediately is quite sufficient for that purpose, if it be in the Court. It would be some scandal to the administration of the law if the plaintiff's objection had prevailed. *Wigmore Cas. 227*

Proviso para (5)—When the adverse party or his pleader has admitted loss of the document. The rule requiring notice to the opponent proceeds on the assumption that the opponent has possession of the document the object being to show a demand and refusal to produce. So the requirement of notice does not apply on the theory that the document is unnecessary for the document as notice is unnecessary. It follows that where the document is admitted by the opponent to have been destroyed or lost, or even out of his possession, no notice is necessary for it is no longer a case of opponent's possession, but of loss. *Wigmore § 1203*. In such a case the notice could be nugatory. *R v Haworth, 4 C & P 254*. *Foster v Pointer, 9 C & P 718*, *Hors v Hall 14 East 276*, *Doe v Spill, 3 B & Ad 182*, *Taylor § 455*. A party however cannot under this exception call for a document that has been traced into the hands of a third party.

Where by the proponent's own hands—as by the presumptive receipt of it, then even taken

notice, while if we take the opponent's denial in express refusal to produce, which equally puts the plaintiff in the position of being equally unable to obtain the document so that notice is unnecessary. *Wigmore § 1203*

Proviso, para (6)—When the person in possession of the document is out of the reach of, or not subject to the process of the Court. Section 60 lays down that secondary evidence may be given of the existence, condition or contents of a document, when the original is shown or appears to be in the possession or power of any person who is out of the reach of, or not subject to, the process of the Court, and when after the notice mentioned in section 60, such person does not produce it. "There is therefore a clear legislative enactment that notice or a reasonable notice, must be given, but that is qualified by s. 60, clause (6) which dispenses with notice. Mr Jackson argues that there must

him at the last moment at the hearing of the suit, would have been nugatory. *Mellus v Vicar Apostolic*, 2 M 295. In *Harmand v Ram Gopal*, 27 C 639 (648) = 3 C W N. 129, Lord Hobhouse said "His proof of the *Silhu* records ions 65 and 66 of the Evidence Act secondary documents, which they are under section 74, when the person in possession of the document is out of the reach of or not subject to the process of the Court, which in the case here" See also *Harmand v Ram Gopal*, 2 Bom L R 562

will be observed that under such notice is not required, the

ht." This is a relaxation
225 An express waiver of

348 = A I R 1926 Pat 512 = 6 Pat 542
letters were in the possession of parties into claim, but the plaintiff did not take steps. Held that there being no question of the genuineness of the document these steps should have been waived by the Court and the document admitted in evidence under s 66 of the Evidence Act. *Habiram v Hemnath*, 19 C. W. N 1068

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting

Proof of signature and handwriting of person alleged to have signed or written document produced

Principle The introduction in evidence of a writing is not accomplished when the document is produced in Court. There is still a preliminary matter to be attended to before the writing can be received. This is the authentication of the writing or the proof of its genuineness. *McKelvey's Ex* §§ 277-279. Most documents bear a signature, or otherwise purport on their face to be of a certain

and must be supplied by evidence. But a document purports in itself to indicate its authorship, and the perception that this element is nevertheless missing, and must still be supplied, is likely not to occur. There is a natural tendency to forget it. Thus it has constantly to be emphasised by the judicial requirement of evidence to that effect. Thus it is that in the tradition of the common law a wise emphasis has been placed upon the necessity of supplying the logical element of authenticity for writings. The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; there must be some evidence of the genuineness or execution of it. *Wigmore* § 2100, *Horns voke's Trial*, 25 How St Lr 78, *Prial v Vanbatenburg*, 2 Camp 139. "In the ordinary affairs of men, it is very often assumed, without proof, that he whose name has been affixed to a written instrument placed it there himself. But

7. when signing becomes a matter of legal controversy, it must be established by proof " *Per Bronson C. J in Willson v Beles*, 4 Den 201; 213.

General Principle of Authentication The foundation on which rests the necessity of authentication is not any artificial principle of evidence, but an inherent logical necessity. Thus if as a part of some facts asserted, *Doe's* letter is offered, what is involved in the assumption of the offer is (a) a letter written (b) by *Doe*; thus a letter alone, without the fact that it is *Doe's*, is not receivable, simply because it is not the thing offered. By one of the many rules of Evidence, *Doe's* letter may be admitted. The element of authentication may be, the element of assumed in all. This logical element the importance of proving it, exists wherever any personal connection with a corporeal object is assumed in the offer. The necessity of authentication, therefore applies equally well to chattels—to a knife, a horse, a coat, etc., whenever it is asserted to be connected with a person. This process of authenticating chattels is ordinarily referred to as identifying them, but the two ideas are distinct, and different principles of evidence are applied. Identification presupposes that two objects, apparently different, have been referred to and the issue is whether they are in fact one and identical, not separate objects.

act, i.e. the presence or absence of M at the time or place (if those are known) when the document was made (b) [in the document itself. These will be (1) the handwriting (written), the style of handtyping (2) the ink or other script medium, (3) the paper and other inscribed material, (4) the seal, (5) the contents, (6) the other marks.

class of evidence (III) The retrospective to the making or not external. (a) Internal found, e.g. a dead person's library, yet the document may have been placed there by a falsifier (2) a postal stamp or post mark or other mark indicating that an official has acted upon the document at some time and place, but this mark may have been falsely used.

(3) Sundry marks indicating action by some one subsequent to the original marking, e.g. burnt edges, indicating an attempt to destroy by fire. (b) External evidence will include (1) all subsequent separate conduct by the alleged maker, indicating a consciousness of its genuineness or the reverse, (2) All subsequent separate conduct by third persons having a similar import—*Higmore* § 2131, *Higmore's Principles of Judicial Proof* § 52

Scope of the section of a document, there is what it purports to be? I point is dealt with in Evidence Act governs *v. Gudarkoori* 82 Ind C 306. The nature of the evidence will depend to a large extent on the nature of the document. If it is a mere memorandum such as the entry in a diary mentioned in s 32 (b) it must be proved that the diary was really that of the person whose statements it is said to contain. If it is a letter it must be shown who wrote it, or at any rate who signed it for a signature to a document turns the whole document into a statement by the person who who executed it. *Mishra* *Ev* necessary under this section.

This section does not require to be produced. Nor does the Act require the writer of a document to be examined as a witness. *Abdool Ali v. Abdool Rahman* 21 W R 429. The proof of hand writing and signature under this section must be by any of the recognised modes of proof and amongst others by statements admissible under s 32 of the Evidence Act. *Ibdulla v. Gunnabai*, 11 B 690. The execution of a document cannot be deemed proved as it is required by the Evidence Act merely because it is proved in the sense of the definition of 'proved'. That definition of the word 'proved' must be read along with s 67 of the Act until it is proved that the signature purporting to be that of the executant is in the hand writing of the executant the Court cannot proceed to consider whether the execution is proved. In other words section 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document. *Salark v. Mst. Tunu Bano* 107 Ind Cas 564—A I R 1928 A 303. But it was never intended by s 67 of the Evidence Act that direct evidence of hand writing was always necessary but that section merely stated with reference to needs what was the universal rule in all cases the new rule either to or felt

the fact of execution of the document was properly proved. *Karali v. The Dist. Indian Railway* 48 C L J 32=111 Ind Cas 492=A I R 1918 Cal 498, *Barindia v. E*, 14 C W N 1209 1210

and of proof is required for it must nevertheless be shown signature denoting execution who professed to execute it. A

Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution. If there are suspicious circumstances attending the execution of the document such endorsement cannot be resorted to for the purpose of holding that the execution has been proved. *Jogannath v. Dhuraja* 5 O L J 191=48 Ind Cas 279. Under this section a document can be proved by any

is 390. When a register is produced in order to prove the execution of the document in it must be proved by oral

testimony that the register was in fact a regular of attendance kept for the on a stated date. *Mishra v. J*

said 'There is no evidence as to who wrote down the names which appear on the page in question. It is suggested that the names or signatures were written

(1891) A C 435 Where the alleged executant of a deed (who was a marksman) denied execution and all the attesting witnesses are dead or for some other reason not available, proof of the handwriting of the attesting witness and of his identity is sufficient proof of execution. This is founded on the rule that on proof of his handwriting every thing must be presumed to have been rightly done, and a fraud must not be imputed without some evidence on that behalf. *Ponnu Suman Kalyansundara* A I R, 1930 Mil 770=125 Ind Cr. 231

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had been furnished But as there can seldom be a sole person knowing the
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the same facts are often persons hostilely interested who thus have a motive for fabrication; and if it were once laid down as a general rule of law, that the contents of a letter might be taken as evidencing its authenticity, too many would be found to take fraudulent advantage of this rule. Accordingly, it seems generally conceded that the mere contents of a written communication, purporting to be a particular person's are of themselves not sufficient evidence of genuineness. Only in special circumstances, where the contents reveal a knowledge or other trait particularly referable to a single person, could the contents alone suffice. II

of a particular
, (a) an illiterate's
letter *Ibid.*

Illiterate's letter, typewriting It ought to be conceded that where there is no direct testimony to the act of execution or sending by an illiterate, the evidence to be drawn from the contents should in some situations, be allowed to suffice to go to the jury. The case of an amanuensis using a type writing machine prevents a similar impossibility, whenever the signature (as sometimes happens) is also type written or stamped and it would seem that a similar necessity justifies a resort to evidence from contents. If there were a serious possibility of abuse this step would not be advisable. But in fact there is also a danger of abuse in the opposite direction for the difficulty of authenticating such a document is sometimes taken advantage of by those who wish to be able to disavow their authorship. Today however in view of the scientific development of the study of documents by microscopy and other arts the authorship of type written documents can often be traced with certainty to the specific machine used, so that this mode of authentication does not then in principle differ from that of using the handwriting. *Wignote* § 2149

Printed matter—news paper Vide notes under s 81 *infra*

68 If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the

Proof of execution of
document required by
law to be attested

purpose of proving its execution, if there be
an attesting witness alive, and subject to the

process of the Court and capable of giving evidence.

"Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with, the provisions of the

58. Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied*

The general notion of
be called before another
of that particular witness
to obtain knowledge of the matter more accurately than any other person. His
opportunities of knowledge, it must be supposed, have been not only better than
those of others, but so much better that it would be a palpable risk of injustice to
proceed in the trial without endeavouring to obtain him. Moreover, such a rule
should be applied only where the class of witnesses thus preferred can be
designated with
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can contribute
by the law by
the partisan interests of either side may fail to furnish *Wigmore* § 186.

History of the rule "As regards the requirement" says *Professor James Bradley Thayer* that the proof of the execution of an attested document must
be by the witnesses if they can be had, this, also, has a clear and very old origin.
Such persons belonged to that very ancient class of transaction or business
witnesses, running far back into the old Germanic law who were once the only
sort of witnesses that could be compelled to come before Court. Their allowing
themselves to be called in and set down as attesting witnesses was understood

Proof by witnesses
ly to know the fact
ght be, he could not,
as, unless he had
It was a part of
witnesses formally

allowed their names to be written into deeds in large numbers. When jury trial,
or rather proof by jury, as it originally was, came in, the old proof by witnesses
was joined with it, when the execution of the deed was denied, and the same
process that summoned the twelve, summoned also these witnesses. The phrase
of the precept to the sheriff was *summoned duodecim* (etc, etc,) *cum aliis*. The
presence of these witnesses was at first as necessary as that of the jury. Great
delays and embarrassments attended such a requirement where the number of
witnesses in
Accordingly
necessary,
After another
longer a new
century, in 1562-63, process against all kinds of
them to come in, not with the jury or as

witnesses could not in one way or the other
to come in. As regards ordinary witnesses to the jury, compulsory process
seems not have been introduced until 1813. Since 1813, the
attendance of
not be got,
long period
whether a de
denied it. Ha

any that can be stated in a Court of Justice" *Thayer's Prel. Tr. L.* pp. 502, 503

Reason and Policy of the old Rule

Strictly speaking there is no sufficient

Lord Ellenborough (in *R v*

and ratiocinative system of

1700 & So on this point

is great Judges Not being

able to make a departure from long tradition, insufficient and inconsistent reasons for enforcing the rule have been laid down in support of it. The rule

is thus stated by Lord Ellenborough L C J in *R v Harrington*, 4 M & S.

350 "In as much as they are pledged witnesses the knowledge they have upon the subject is essential, and if it can be procured must be forthcoming."

See also *Barnes v Trompousky*, 7 T R 26. In *Gerapulo v Wieler* 10 C B

because 'he is the witness agreed

v Garth, 8 Exch 803 Pollock C B

to prove the execution of a deed

for this reason, that by an imperative rule of law the parties are supposed to

have agreed in *terro* that the deed shall not be given in evidence without his

execution. Relying

(of the rule) is not (as in

evidence, but that he

o speak to the circum-

ed for the purpose of

dispensing with proof at the trial, but cannot be broken." But the difficulty

about this reason is that no such agreement

attestation is required by law. Moreover

not apply between others than the parties to the deed.

fact. Further more this assumes that the opponent charged as obligor or

maker is a party to the document—which, if the execution is denied is an

assumption of the very point in issue. *Higmore* § 1208, *Fransworth v Briggs*,

6 N H 561, 565 *contra Chamberlayne v Ey* § 487. Some of the Judges

assigned the reason

attesting witness as

Porter, 4 Esp 241, 1

principle that there

of what took place. *Le Blance J* in *Chil v Dunning* 1 East 51 where he

reason is reiterated by *Le Blance J* in *Chil v Dunning* 1 East 51 where he

said 'A fact may be known to the

ledge or recollection of the obligor, and

knowledge of the subscribing witness rel

Athurst J in *Abbot v Plumbe* 1 Dougl

are numerous. First it is inconsistent with the rule itself, for the rule applies

even where fraud, duress and time are not in issue, and even where the maker

himself is competent as a witness. Again, the attester is in practice not usually

a person who knows anything about the circumstances preceding the document's

execution, or knows more than any other person who by being present

could be a qualified witness. Finally if the witness does possess special

knowledge about some affirmative issue, the opponent is the proper person

to call the witness, if he desires him. So this rule has no justification in its

original broad form. *Higmore* § 1208. Has the rule, then, a justification in

policy? It certainly has none in its original broad form. But in most jurisdictions

it has by statute been limited to documents required by law to be attested, and

in this shape it seems to be entirely justifiable. In the first place the attestation

is in such cases required by law as a special precaution against forgery, thus

the attestation itself must in any case be proved as an element in the validity

of the document, and there seems to be no special hardship in obtaining the

86. witness rather than in obtaining evidence of his signature. In the next place such documents are, in most jurisdictions, wills of deceased persons and deeds of illiterate persons, for such documents the maker himself being either deceased or not acquainted with writings, the attester's testimony is almost inevitably the most desirable and most trustworthy source of information as to the fact of execution, more over it is in such cases that the defences of fraud and undue influence are most likely to be made and here also the attester's testimony is likely to be of use and ought to be obtained if possible." *Higmore* § 1288

Reason of the departure from the old rule and principle underlying the section. "We do not purpose to meddle with the execution required either by the Legislature, we think it deserving of serious consideration whether the execution of written documents may not in ot

was executed. But it is notorious that in practice the attesting witness in the majority of instances knows nothing of the transaction, the instrument having been prepared by a clerk, servant, or a neighbour is called in to attest it. A del to which no parol testimony is not admitted to contradict or vary the terms of

of the document is not the real matter in dispute and where there are no concomitant circumstances to be inquired into is often attended with difficulty and expense and sometimes leads to the defeat of justice. Cases have occurred where, in tracing a title, numerous witnesses from distant parts have been rendered necessary to prove the formal execution of deeds though their execution was not really in dispute by a single witness, which it was thought the party alleging title the adversary's case it was not supposed

received, and the party requiring it of the document is not really in dispute to be limited to any particular witness to prove the execution. When genuineness is in dispute, the party producing it will be sure to call the attesting witness as the absence of the latter would throw the greatest discredit on the instrument. We therefore recommend that except in cases where the evidence of attestation is requisite to the validity of the instrument an attesting witness need not be called. *Common Law Procedure Commission, Second Report* (1853) p 23, *Higmore Cas* Ex p 246

Attestation of documents—calling of witnesses. No document can be used if not by

when the genuineness of the document has to be proved. *Mallory, Ex* 61. Sections have no direct bearing on the question as to whether the attestation was according to law. *Balkrishna v Narain Shah* 13 N L R 21. Section 72 lays down that an attested document not required by law to be attested may be proved as if it was unattested. Section 68 is applicable to cases where a document is required by law to be attested. *Amur v Ghugi* 103 Ind Cas 57. To prove wills required by law to be attested an attesting witness attesting witness alive, and subject to giving evidence. *Tulsi Singh v Jadar*, 82 Ind Cas 306. Where all is sufficient to prove the hand written by other evidence. (*Fido* s 69).

but execution of a document will be sufficiently proved when it is admitted by the party himself who has executed the document (*Vide s 70*). So also where a document is thirty years old, the Court may in its discretion presume the genuineness and due execution as well as attestation of the document (*Vide s 71*). The Court shall presume also that every document called for and not

does not recollect it, its execution may be proved by other evidence. Vide s.

Slope of section 68 The object of placing more than one attestation upon document whether at any party's voluntary instance or by requirement of law, ordinarily not to demand the combined testimony, of all at the trial, but merely provide by way of caution a number of witnesses, so that the contingencies death, removal of residence and the like, may be guarded against, and one witness at least may be available But a main object in Statutes requiring execution with two or more witnesses is to afford a secondary and a J said look primarily to the testimony of the testator and three witnesses

should be in the nature of guards or securities, to protect him in the execution of his Will against force or fraud or undue influence. The proof of the Will by the three witnesses supposing it should afterwards come in contest only is an incidental and secondary benefit, derived from the mode of attestation. It is well settled that in an action at law it is sufficient to call only one of the subscribing witnesses if he can speak to the observance of all that is required by the statute." *Doe v Lees* 7 C & P 574. In *Bullen v Michel*, 4 Dow 297, 331, Lord Eldon said "They usually call one witness leaving it to the other side, if they think proper, to call the other witnesses." According to English

Wignmore § 1304, see also *Ogle v Cook* 1 Ves Sr 177 *Grayson v Atkinson*, 2 Ves Sr 454, 460, *Binfield v Lambert* 1 Dick 337, *Bird v Butler*, 1 D Ch 337; *Powel v Cleaver*, 2 Bro CC 449 501, *Fitzherbert v Fitzherbert*, 4 Br CC 231 *Carrington v Payne* 5 Ves Jr 401, 411 *Bootle v Blundell* 19 Ves Jr 494, *Winchelsea v Wanchope* 2 Russ 411, *Tatham v Wright*, 3 Russ & Myl 1 8, 16 According to section 68 of the Evidence Act, to prove the execution of a document required by law to be proved by two witnesses must be called to prove

in the Punjab which requires *balz* entry to be attested at all *manuar nam v*
Ghugi, 108 Ind Cas 57—A 1 R 1928 Lah 143 A mortgage deed signed by
the marksmen was attested by three witnesses In a suit on mortgage its
execution was not specifically denied but the plaintiff sought to prove the same
Two of the attesting witnesses having been dead the third was called, but he
deposed that he attested the deed in the absence of the executant It appeared
however that
the Sub Regi
also spoken
Held that un
the execution of the mortgage was not specifically denied *Yatub Khan v*
Gulhar Khan, 52 B. 219—30 Bom L R 565—111 Ind Cas. 237—A 1 R. 1923

68. Bom 267 An account book is not a document which is required by law to be attested and this section has no application to a case in which such account book is produced in evidence. *Emperor v Narboda Prosad*, A I R 1930 All 38. There is no law which requires the attestation of a sale deed so far as the Punjab is concerned. This section has therefore no application to sale deed in that province. *Moharaja of Ferozpur v Anath Ram*, A I R 1929 Lah 1. One of the three attesting witnesses being alive the plaintiff called one witness and when he resailed the plaintiff proceeded to prove the document by other evidence. *Held* there was a full compliance with the provisions of s 68 and 71. *Hinsor Ali v Gurudas Kapah*, A I R 1927 Cal 188=33 C W N 243=49 C J 16. Where no attempt is made to prove a mortgage deed either by calling in an attesting witness or even by putting any question to the scribe of the deed who was examined as a witness regarding the attesting witnesses or attestation the document cannot be used as evidence. *Jinan v Dilip Singh*, A I R 1929 All 389=27 A L J 538. The amendment by Act 31 of 1926, is a provision relating to procedural law and not a substantive law and therefore must be taken to be retrospective in operation. *Thayammal v Muthu Kumar Sivan*, A I R 1929 Mad 81. Where the executant of a mortgage deed, the writer of the deed and the attesting witnesses have all died, having regard to the new definition of attesting in s 3 of P. A. Act, and to the varied mode of proving registered document as amended by s 68 Evidence Act it is sufficient to satisfy the Court that the execution which was not specifically denied was so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it was so executed. *Parun*. To satisfy the requirement of this section put his mark in the mortgage deed. 12 A L J 1114. Sections 63 to 71 of in which the fact of execution may and have no direct bearing on the question as to whether the attestation was according to law. The sections proceed on the assumption that the attesting witnesses referred to are attesting witnesses within the meaning of the law requiring the document to be attested. If the fact that there are any valid attesting witnesses is denied, it has to be proved like any other disputed fact. If the execution is admitted no other proof of mere execution is required, and if the document on its face purports to have been attested by the required number of attesting witnesses and if it is not denied that the question of valid attestation does not arise, then the maxim *omnia præsuntur* however it is denied that the attestation, relying on the deed as an attested deed must is not admitted. Even if due attestation is not denied, but evidence on the subject is given the Court cannot ignore the evidence. There can be no due attestation without execution, and the fact of execution is of no mortgage deed is concerned. L. R 21 By the terms of this section when a document cannot be used as evidence at all as a document either requiring attestation or in fact attested, but this does not prevent it from being used in evidence as something else or for any other purpose. Section 69 is subject to the limitation viz., that if the documents were tendered in some other proceeding for the purpose of proving the handwriting of the scribe, it could not be objected to upon the ground that no attesting witness being called to prove it it could not be used in evidence at all. *Moti Chand v* 121=44 Ind C 15 596. The law is imperative and does not on the face of it cases provided in ss 69 70 and 71 of the Evidence Act. Other evidence under s 71 cannot be admitted where the provisions of s 61 have not been complied with. *Banarsi v Gopinath*, A I R 1931 All 411. *Prabu v Venkata*, A L R 1932 Mad 148=34 L W 663. Where a mortgagor admits having signed the mortgage sought to be enforced but couples it with a denial of the presence of the attesters at the time of signing the mortgage the mortgagor must prove the execution of the mortgage by calling at least one attesting witness to prove the attestation. *Aryun Chandra v Hailash Chandra*, 36 C L J

58. be present ~~the~~ witnesses and see it signed by the testator. And the principle was given effect to in the *House of Lords in Buddell v Spilsbury*, 10 Cl & F 340. There the Lord ~~the~~ party who sees the witness he is an ~~the~~ by two witnesses required by section 59 of the Transfer of Property Act is attestation of the actual fact of the execution *Shamu Patter v. Abdul Kadir*, 16 C. W. N. 1009 P C. The witnesses must see and be conscious of the act done and be able to prove it by their own evidence, they must be both mentally and bodily present, for if not, they might mind. *Per Dr Lushington in Hudson v* (1864) 3 S & J. 578, *Sir Gorell Barr*

In my view, at the end of the transaction

W. 404; see also *Sharp v* 44-10 Bom. L R 943; *Da* 256; *Sashubhusan v Chana* 364 (P. C.) Again in the *ca Phillips*, 4 E & B 450-24 ment was not merely to sub- execution, but included al some disinterested person capable of giving evidence as to what took place These cases contemplate as a requisite of a good attestation that the document must have been executed in the presence of an attesting witness, who sub- cribed his name to the instrument in token of this circumstance *Sarungigur Begam v. Boroda Kant*, 37 C 526-11 C L J 563-14 O W. N 791; see also *Ganga Parshad v. Ishri Pershad*, 45 C 748-27 C L J 548; *Deonaram v. Kakur*, 24 A 319 (F. B.), *Prankrishna v. Jadunath*, 2 C W. N 603, *Gundra v. Bejoy*, 26 C 246-3 C W N 81; *Dinomona v Banbhary*, 7 C. W N. 160, *Sashubhusan v Chandra Peshkar*, 4 C L J 41-33C 861

tion,
defend
case o

soning appears to be based on good sense, of justice, equity and good conscience.

according to which the Indian Courts are bound to decide *Per Mookerjee J in Surungigur Begum v Boroda Kant Mitter*, 11 C. L. J. 563 (572)-37 C 326-14 C. W. N. 374.

Presence, meaning of—Signature of a *Purdanashin* lady—how to be attested. S.

ed. *Saradani's Law D*

Presence of R and B

Witness A's execution

Dictionary of law attes

a written instrument, to

also *Bay v Halse*, (1

instrument be deemed to have been executed in the presence of a witness. It may be generally stated as the result of the decisions, that presence involves two ideas, namely, mental cognition of the act, and physical contiguity; in other words, the person in whose presence the act is done must be able mentally to know what is being done and what is done in the presence of a person, must take place in phys

inflexible rule as to

trated by a referen

to what extent judic

subject, *Cass v Dill*, 1 Bro C C 93, it was held that when the testatrix sat in her carriage, opposite to the window of the attorney's office, in which the Will was attested, the

the room the two witnesses

who attested the codicil, the curtains at the foot of the bed were however drawn

Sir Herbert Jen

hold, if necessary

have attested in

that the testator,

The principle deducible from the see

according to the custom of the country,

before male witnesses a document w

sively proved to have been executed b

be deemed to have been attested by

purdah, and who before attestation, satisfied themselves that there was no fraud,

and that the document had been actually executed by the lady screened off

from their gaze *Sarrurjigur Begum v Baroda Kant*, 37 C 526-11 O L J,

563. This view has also been adopted by Brett J in the case of *Harmongal*

v Ganour Singh, 13 C W N 40 and by Stephen and Chatterjee JJ in *Ira*

Prosad v. Gunga Prosad, 14 C. W N 165. A mortgage deed was taken for

execution behind the *purdah* to a *purdanashin* lady. Her son came from behind

the *purdah* and said that it had been signed by her. The witnesses thereupon

affixed their signatures to the document, though none of them saw her sign it.

Held that there was no valid execution of the document as it was not attested as

required by section 59 of the Transfer of Property Act. *Rai Ganga Pershad v*

Ishra Pershad, 22 C W N. 697-18 O 748-31 M L J 547 P C; see also

Ihra Rai v Ram Hari, 5 Pat 58 (P C)-89 Ind Cas 659-A I R 1925 P C.

417-45 Ind Cas 691, *Padarnath v*

991 P C=37 A 471; *Rai Rathi*

not necessary that the attesting witne

sign the document. *Kasidanbi v. Ga*

W N

It is

lady

Requisites of valid attestation. The object of attestation is that some person should verify that the deed was signed voluntarily. *Sarrurjigur v. Baroda Kant*, 37 C 526-11 C. L J. 563-11 O W. N. 971. The attesting

18. witnesses must subscribe with the intention, that the subscription made should be a complete attestation of the Will, and evidence is admissible to show whether such was the intention or not. *In bonis Wilson*, 1 P. & D. 269, *In bonis Sharman*, 1 P. & D. 661, *Griffiths v Griffiths*, 2 P. & D. 300, *In bonis Murphy*, 1 R. 8 Eq. 300; *Robert v Phillips*, 4 E. & B. 450, *In the goods of Streatley* (1891) P. 172. The witness execution of the document as an nature to be attested, by which Rob 712; *Ewon v Franklin*, D. Phiffs v *Hale*, 3 P. & D. 166; *In bonis Dilles*, 3 P. & D. 164, *Leonard v Leonard*, (1902) P. 243. Where a witness, put in his signature without any intention of attesting, it is not a valid attestation. *In bonis Smith*, 15 P. D. 2, *In bonis Murphy*, 1 R. 8 Eq. 300, *In bonis Sharman*, 1 P. & D. 661. The attesting - Pearson. that the of the Dunn, 1 in any witness Hanman (1843) 1 Rob. 757, *Roberts v Phillips*, 4 E. & B. 450, *Savitra v F. A. Sar* 19 C. P. mu R. 6. 11 C. L. K. 359. Generally, any competent witness may attest; thus marksmen, (*Re-Enyon*, 3 P. & D. 92) and infants if of years of discretion, may be attesting witnesses. *Phup Ev 7th Ed* 501. A party to a deed or his agent cannot attest it. *Seal v. Calridge*, 7 Q. B. D. 516, *Peace v Brookes*, (1895) 2 Q. B. 415.

Attest
his signature
v. Krishna,
Ind. Cas.
145; *Dhar*
Ayyasame
Abinash v 1

attesting witness must be shown or presumed. *Radra v Abdul* 35 A. 201.

purpose and in whatever manner, is as a

41 M. 535, *Dinomoyee v Bonbehary*,
48 C. 61. Where the name of the
under a separate heading styled "scribe" apart from the signature of the
only other person who signed as
signature of the scribe was not, as
as attestation. *Abinash v Dasa*
v. *Ajodhya* 20 C. W. N. 699-34.

mda v Ramoomai, A. I. R. 1927 Sindu
853-A. I. R. 1925 Oudh. 734 A
behalf of the mortgagor cannot be a

competent attesting
Cas. 720; *Paban*
Sristidhar v Ra
case, the scribe of
name at the end c
Held, that such

the meaning of this section *Bahadur v. Bahadur*, 5 N. L. R. 3-1 Ind. Cas. 173; but see *Ravi Sahu v. Gauri Sahu*, 39 Ind. Cas. 153. Where a person who has signed a deed as a scribe subsequently witnesses the onus of proving this assertion is on him. *Ravi Sahu*, 4 Pat. L. J. 311-53 Ind. Cas. 73. In any case a scribe wherever he writes the document as an attesting witness unless he actually puts so in the document.

§ 405-23 Bom. L. R. 136-65 Ind. Cas. 616. A scribe who executes a document for and on behalf of the executant is not a person who "sees what passes" or "sees it executed" when he himself does the very thing to which he subsequently signing as a witness he professes to be a witness. *Srinivas v. Lakshmaiah*, 63 Ind. Cas. 507.

Attestation by a Sub Registrar. The registration of his Will by a testator and his signature to a certificate of admission of execution, testified by the signature of the Sub Registrar, and of a witness is a sufficient attestation to satisfy the requirements of section 63 of the Succession Act. *Imarendra v. Kashi*, admits his names on the Will as witnesses to the admission of the testator, such attestation is sufficient to satisfy the requirements of s. 63 of the Succession Act. *Atiya v. Nagendra*, 11 C. 429; *Sarada v. Triguna*, 1 Pat. 360; *Rajendra v. Menota*, 1 Pat. L. R. 267; *Herosundara v. Chantler*, 6 C. 17-6 C. L. R. 303; *In re Roymonce*, 1 C. 150; *Horendra v. Chandra*, 16 C. 19; *Mohammad v. Ali Haidar* 12 O. L. J. 1- A. I. R. 1901 V. C. 227. *Syl v. Tarjaba*, 1 O. L. J. 591-26 Ind. Cas. -23 Bom. L. R. 339. But a Sub Registrar's attestation cannot be taken to be a good proof that he affixed his seal or signature in the presence of the executant. *Abmah v. Dasarath*, 32 C. W. N. 1228, but see *Radha v. Nripendra*, 17 C. L. J. 118.

Personal acknowledgment. "What is the plain meaning" asked *Dr. Lushington* in *Hudson v. Parler*, (1944) 1 Rob. 11 at p. 25 of acknowledging

of *Blake v. Blake*, (1882) 7 P. & D. 102 at p. 107 *Jessel M. R.* observed "What is in law a sufficient acknowledgment under the statute? What I take to be the law is correct in the fact that the witnesses to the will should

68. them to sign their names, that amounts to an acknowledgment of his signature, if the Court is satisfied that the signature of the testator was on the Will at the time' In *Blake v Blake*, (1882) 7 P. & D 110 *Jessel V R* considered the cases of *Guillim v Guillim*, and *Beckett v Howe*, and observed 'I cannot find one word in the judgment of *Guillim v Guillim*, to show that *Sir C Cresswell* was of opinion that if the witnesses were saying he had signed would be sufficient out the interpretation put upon it by new doctrine laid down in that *c Parker, supra* The existence of any such doctrine rests entirely upon the state-

ords to that effect,
this is my signature

Daintice v Fesolo,

(1898) 13 P. D 102 at p 103, *Cotton L J* took a similar view Similarly in *Hoit v Genge* (1842) 3 Curt 160 at p 172 *Sir H J Fust* said: "The production of a will by the testator, it having his name upon it, and a request to witnesses to attest it would be a sufficient acknowledgment" In *The Goods of Thompson*

is produc

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the page

of his signature by the testator". See also *Balmulund v Bhagandas*, 13 Bom L. R 209-19 Ind Crs 401; *Manickas v Hermusji*, 1 B 457; *Hurro Sundari v Chunder Kant*, 6 C 17, *Nitya Gopal v Nagendra Nath*, 11 C 49, *Amarendra v Kashi Nath*, 27 C 169 Attestation in the presence of a testator on acknowledgment of signature or exec. *Chand v. Mohanand*, 6 C L J 453, *Sobairi v Sari*, 19 C W N 1297-29 In has been added by the Transfer of Pro Since the passing of that Act attestation a personal acknowle passing of that Act, before the attesting sufficient, *Vide Sha P C, Saheda v Raju* (P. C) = A. I R 1 263, *Ranu v Laxmanrao*, 33 B 44.

Act, the law was the law of the acknowledgment of

the donor Such attestation was held to be not valid attestation *Vide Amarappa v. Raghava*, 44 B 231; *Saheda v Rajah Ram*, 11 A L J. 757-21 Ind. Cas 83, *In re Velutapalatti Peda*, 9 M L T 57-8 Ind Cas 887; *Baynath v Biraja*, 2 Pat. 52(61). These rulings are also no longer good law.

of

been duly accounted for. *Suamudin Singh v. Kant Fatima*, 11 Ind. Cas 77 Where only one attester proved a mortgage bond attested by more than two witnesses and when its due execution was not denied, held that having regard

to s. 63, the document may be taken as properly proved. *Nunl Kishore v. Ance Lam*, 29 C. 25-6, 2 W. N. 195. It is not correct to apply an Act which was passed subsequent to the trial of a case to the procedure in the case. Provision to s. 63 of the Evidence Act was held inapplicable to a case disposed of before it took effect. *Amrit Singh v. G. P.*, 131 Ind. C. 557-1931 A. L. J. 312-A. I. R. 1931 All. 411. A mortgage bond supported to be executed by three persons who were all dead at the time of the suit. The signature of each of them was represented by an irregular scribble such as might be made by an illiterate person, and against each of these marks there was a statement that it was the mark of one of the executants, the name being given in each case. These statements were proved to have been written by a deceased professional bond-writer who wrote the whole document in the ordinary course of his business. The two attesting witnesses also were dead and the signature of each of them was satisfactorily proved to be in his handwriting. Held that there was sufficient proof of the execution of the bond, and that the statement in writing of the deceased bond-writer was relevant under s. 32 (2) of the Evidence Act. *Hutti v. Manakchand*, 11 N. L. R. 9-27 Ind. C. 506. Where the only living witness of a document was illiterate and on being examined denied its execution. Held, that the document could be proved by other evidence. *Bairi Prashad v. Gramthar*, 26

So long as there is one such witness as has been called. The fact that, when called, he will prove hostile, does not excuse the plaintiff of his duty. *Tulsi Singh v. Gopal Singh*, 1 Pat. L. J. 369. Sections 63 and 69 read together were intended to lay down how a document

It was not the intention of the legislature that an attesting witness or some other witness should have to prove further that the document was in fact signed by the mortgagor in the

Munna Lal, 11 A. L. J.

15 A. L. J. 164-39

signatures of
, and that of
ption of its
gh v. Hukam

Singh, 15 A. L. J. 167-39 A. 112-38 Ind. C. 501. It is not necessary that two attesting witnesses should be called when two are alive nor that even assuming that one only need be called, he should at least be made to prove

Venkata v.
Mere proof
f a document
ment is one

that the document was executed in the presence of two attesting witnesses. *Perumal Chattriar v. Raghava Chattriar*, 11 L. W. 563. Where evidence of the

3. execution of a deed is available which, if tendered would satisfy the requirements of s 68 of the Evidence Act, the Court is justified in refusing to draw the presumption under s 90 of that Act nor can such presumption be invoked in favour of the deed nor would such presumption be justified in favour of the authority of a person to sign for an illiterate executant *Raghubar v Sanual* 8 O L J 23=61 Ind Cas 125 Where the only living attesting witness to a mortgage deed who had to be and was called by the mortgagee to depose to a execution and attes the mortgage, was got at by the the clear evidence he gave in the attestation Held that the sworn evidence given by the witness in examination in chief can be acted upon by the Court *Thannem v Bommaderara*, 11 L W. 344= (1911) M W N 747

The death of attesting witness legal evidence not by hearsay found must be proved to the satisfaction of the Court by diligent and honest search A it can be compelled to attend the Court to give his evidence *Asomeah v S R. Chettu*, 13 Bur L T 114=61 Ind Cas 637

To prove a deed of gift the production of a witness who identified the donor and also the attesting witnesses when the deed was being registered and who was known personally to the Sub Registrar together with an entry in favour of the donee in the village records in succession to the donor, is sufficient *Partab Bahadur v Ramdas*, 60 Ind

it is open to the parties to as a matter of fact see the v *Mon Mohini*, 67 Ind Cas 87 T1 satisfies the requirement of section 68

other is, it cannot be inferred that the back the other and that there his evidence *Chinnarayan v Moulaz Zahurul*, A I R

fact cannot be raised for the first time in second appeal *Erulandi Thevan v Subramania Iyer*, 97 Ind Cas 611=1926 M W. N 559 Evidence of attesters to mortgage deed is, indispensable unless it is impossible to produce them *Karimulla v. Gudar Kocri*, A I R 1925 All 56.

Required by law to be attested The term "required by law to be attested" means required by law of the country where the property is situate *Elizabeth May Toomey v Bhupendra Nath Bose*, 7 Pat. 520=111 Ind Cas 57= A I R 1928 Pat. 304 In that case *Dawson Miller C J* said. "It was next contended that the indenture of 20th June 1926 was not properly proved as neither of the attesting witnesses to Mr. Macdonald's signature had been called, nor

in this country. The court was divided. The majority held that the signature of his signature required attested the document in Whatever conflicting apply to contracts in relation to law where the *lex loci contractus* and the *lex loci rei sitae* or, as Professor Dicey calls it, *lex situs* differ it seems to be generally agreed by *Story, Dicey Westlake* and other text-writers that in so far as the formalities of alienation or conveyances are concerned the law applicable is that of the country where

the land is situated in, (see, *Dict. of Conflict of Laws*, Ch. 21 and Appendix Note 17).
The law of the land is the law of the place where the land is situated.

It is a well-known principle of law that the law of the land is the law of the place where the land is situated. Thus as to conveyances or Wills of land the local nature of the thing requires them to be carried into execution according to the law here. So also in *Intestates v. Farth*, 5 B & C 451, 132 A C J said: "The rule as to the law of the domicile has never been any that the law of England, law of a foreign country." The law of a foreign country. In *Waterhouse* When the law of a foreign the property of a debtor situated

of the law is to be applied, and it does not therefore apply. *Sanatin v. Dina Nath*, 20 C 222-3 C. W. N. 224

An unattested personal covenant to as containing a Deposit in the Bank of India is impossible to view the question of the execution with reference to the covenant to pay as severable from the execution of the document in so far as it creates a security. *Virappa v. Chinna Juthu*, 3 M L T 175-17 M L J 213-20 M 251, but see *Venkata v. Venkata*, 51 M 163-1 I R 1931 Mad 110-60 M L J 50

In order to prove a sale deed, it is not necessary, under this section to examine a marginal by law to be attested is not a document application to a case in which such account book is produced in evidence. *Emperor v. Narbada*, 51 A 551-121 Ind Cas. 879-A I R 1930 All 34

This section only applies to cases where a document is required to be attested in the manner provided by law and it can not be admitted in evidence unless one of the attesting witnesses is examined. *Mathura Prasad v. Chheda Lal*, 13 A. L. J 553-29 Ind Cas 363

The provision of this section does not apply to the Will of a Mahomedan, and so an admission by the defendant, in a suit by the testator, was held to be relevant in a later suit to prove the Will. *Najban Bibi v. Sayad Raja*, 1 O C 468

Waiver of objection. Where no objection was taken to the admissibility of a mortgage deed in the Court of first instance on the ground that the deed was not attested, it is not competent to object to its admission in a subsequent suit. *Kalithra*, 13 M L J 143

Effect of document not properly attested. A document which is inoperative not being properly attested can not take effect.

161 (F. B.)-11 A L J 141-18 Ind L J 133-36 Ind Cas. 903, *Prannath v. Andra*, 44 C 388 (F. C.); *Official Receiver v. Hemchand v. Mallo*, 10 N L R. 81; 18 S L R 780 *Narayan v. Lakshmandas*,

only one witness is amount contained *Pulaka Vittal v.*

Thiruthapalli, 32 M. 410 (F. B.) (*Madras Deposit and Benefit Co v. Oonamalat*, 18 M 29, overruled); *Sada Kavur v. Rudepally*, 30 M. 281, *Ram Narain v.*

8.

; *Sonathun v. Dinonath*, 26 C. 222; *Dhand v. Jafaladdi v. Mohar*, 26 C. 78; *Dulham v. Behari*, M., 43 M. L. J. 475; *Mathura v. Cheddi*, 13 A. 100; *Cher v. Clara Ruxton*, 4 C. L. J. 510; *Quah Chang*

Transfer of property Amendment Act (XXVII of 1926) whether retrospective. The Transfer of Property (Amendment) Act (XXVII of 1926) was

and *Roy JJ.* held, (i) that in view of the definition of the word "attested" in

adequate, but it was held by a Full Bench in the Allahabad High Court in *Gurja Nandan Kaluar v. Hanuman Das*, A. I. R. 1927 All 1-49 A. 25 (F. B.) and this was followed by a Bench in *Sajer Paramanick*, A. I. R. 1927 Bom 100. The Bombay High Court in *Matulal* decided on the ground that Act of 1926, made the decision in that case, made the

alone, there would have been no doubt whatever on the question. That amendment was, however, inserted in this Act in the middle of a large number of amendments relating to the military and air force and s. 1 of that Act was enacted at the same time which prescribes as follows.—

"The repeal of any Act shall not affect the validity, in any proceedings, of anything already done or suffered, or any proceeding in respect thereof, or the proof of any past act or thing."

... from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing."

Act and under which portions of over 100 Acts are repealed, and amongst these are s. 3 and 1 of Act 10 of 1927. By repealing s. 1 of Act 10 of 1927 that Act would have its retrospective effect restored, but in Act 12 of 1927, the saving clause contained in Act 10 of 1927 is repeated almost verbatim. This saving clause, therefore, enacts that the repeal of s. 3 and 1 of Act 10 of 1927, which would have made that Act retrospective, is not to have that effect, for Act 12 of 1927 cannot be retrospective, of this legislation of 'attested' is not to have retrospective effect. But the view expressed by their Lordships in this case will not make it valid. But the view expressed by their Lordships in this case will not make it valid.

... A I R 1929 Mad 1-55
... ed to the Full Bench for decision was —

"Whether Acts 27 of 1926, 10 of 1927 and 13 of 1927 are retrospective in their nature so as to apply to documents executed on a date prior to their coming into force?"

Courts—*Frother C J* on behalf of the Full Bench answered the question as follows. The Acts are retrospective. We should have thought that Acts 27 of 1926 and 10 of 1927 showed a clear intention that they were to be regarded as retrospective. 772-109 Ind Cas 469-A I R 1928

Mad 881-57 M L J 588, *Dargawati v Jagannath*, 27 A L J 1391-118 Ind Cas 662-A I R 1929 A 680

Proviso So far as any rule of pleading requires that the execution of a document named in the declaration must be expressly traversed, the failure to plead in denial must, under such a rule, be equivalent to a confession of the allegation of execution in the declaration, and thus the execution is not an issue on the trial, and the present rule does not apply. *Wigmore* § 1295, Vide also order VIII, r 5, C P Code. The words, "specifically denied" mean specifically denied by the party against whom it is sought to be used. In *Cook v Transwell*, 3 Taunt, 450, *Gibbs C J* said "In cases where 'non est' part of the deed, he must do it by the attesting witnesses in the common way" See also *Gillett v Abbott*, 7 A. & E 783. Proper reading of the proviso to s. 63

69. is that if
required
deed the
document
the deed

an attesting witness *Radha v Deoki*, A I R 1932 All 320 = 1932 A L J 207; but see *Ramdayal v Sulab*, 14 R D 494. If the validity of a mortgage be specifically denied, in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage deed was attested at least by two witnesses. *Lachman v Surendra*, A I R 1932 All 527 (F B) = 1932 A L J 653

69. If no such attesting witness can be found, or if the

Proof where no attest-
ing witness found

document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person.

Principi
attesting or
is unavailable

to the orthodox form of preferred witness rule, the attestation must even be used in preference to other testimony." *Wigmore* § 1505. The reason is that the attestation is in effect the extra-judicial statement of the attester to the fact of due execution, admitted under the hearsay exception and being admissible so far as concerns the H

attestation of an
when the attester
tion; and according

instrument relative to its
have subscribed his name in
attestation comes in by way
Lossee v Lossee, 2 Hill 600

as a written declaration of
event of his death, or absence, yields a reluctant credit by way of necessary
substitute for his oath. *Mr. Hill's Note on the case*; *Wigmore* § 1505. So this
extra-judicial statement, expressed or implied, is always, when the attester is
unavailable, admissible by exception to the Hearsay rule. The question there
is, not merely whether it is admissible, but whether it is preferred to any other

attester is personally
that extent disposed
could now be made

a part of the rule of preference that, before thus going to other testimony,
the attester's
singular and
signature

over testimony on the stand under cross-examination is an extraordinary
measure, assuming for such a statement a value not at all to be attributable
ordinarily to such statements. Nevertheless, such a preference unquestionably
existed as a part of orthodox common law rule in England. *Wigmore* § 1310.
But this section requires that the signature of the maker also, as well as that of
the attester must be proved. This contention means in effect that another
witness to the maker's signature must be called, for (as has just been noted)
the attestation is the attester's testimony to the fact of execution, and the placing
of the signature by the purporting maker. If, then, it is necessary to call a
second witness to the maker's signature, this must be on the supposition that
the testimony of the attestation, taken alone, does not go far enough in its
implied or expressed statements. This is indeed the ground upon which in
part the above contention has been rested. It argues first, that the attestation,

while asserting execution by a person of a certain name, does not sufficiently identify that person with the party in the case. It argues further more, from the point of view of policy, that a person might be bribed to make a false

attestor's M 520 that that proof the defendant

with the note what is the effect which, with the greatest degree of latitude can which desc utime A B

stop further and show that the defendant is A B of C in the county of York, or in some manner establish that he is the person by whom the note appears to be executed Now what does the subscribing witness in this particular case attest? Why, that this instrument was duly executed by a person of the name of Francis Musgrave There may be many persons of that name and if you do not show

instrument, you ve It is not a instrument

executed why? Because it is an essential part of the issue, which you are bound to prove, that the instrument was executed by the defendant in the suit It seems to me, therefore on principle, that you must give some evidence of the identity of the defendant with the party who has signed the instrument."

Wigmore § 1513 But "when handwriting In this case one is beyond the reach of the process which could be obtained was

on-residents, (m)] and in instrument

Durr Jones § 329

Attestor's Hearsay Statement—How admissible Upon the general principle statement cannot be used ng testimony in person.

he did not see executed by the to trustworthiness seem to be four (1) The occasion is a formal one, and the statement requires a writing; and there is commonly a radical disinclination to take part in a false transaction of such a sort (2) The concoction of a false document will either fix an innocent party with a false obligation or will divert legitimate heirs of their rights, and there is a natural repugnance to giving assistance in such a wrong (3) The making of a false attestation, whether or not it is in criminal law a forgery or a perjury, is popularly supposed to be such, and the attestor would probably be at least an accomplice in a forgery, so that substantive sanction deterring from a crime would probably operate to prevent a false attestation (4) The attestor knows that he is liable at any time to be called upon in Court to substantiate his attestation, and not only in his falsity likely there to be exposed by the opponent's witnesses, but he will there be obliged either to commit perjury by swearing to the fact of execution or to his falseness, of recanting and confessing if circumstances which easily to the Hearsay rule. *Wigmore* § 1508.

Scope of the section By the strict rule of the common law the primary or best evidence to prove the execution of a deed or other writing required by law to be attested is generally the testimony of subscribing witnesses, if available

or if not, then proof of his handwriting under discussion was declared by universal as that can be stated (Maule & S 325) yet it has several qualifications and exceptions. The rule does not apply if the subscribing witness is dead (*Adam v Kerr*, 1 Bos & P 360), or can not be found (*Falmouth v Roberts* 9 M & W. 467=11 L J Ex. 180, *Parker v Hoskins*, 2 Taunt 223; *Birt v Walker*, 4 Barn & Ald 697), or is without the jurisdiction of the Court (*Prince v Blackburn*, 2 East, 250; *Glubb v Edward*, the rule formal and ignorth, 4

acts in secondary evidence, it is equally well received as a rule of law produced at a tri

dead or cannot be of being produce writing; and tha of the instrumen

it must be proved that "no such attesting witness can be found" in other words, before a party can rely u exhaust all process of the Court 16, rule 10, C P C for the arre-property. *Shahzadi Begam v Cas* 756=A I R 1928 Pat 356 (who was a marks-man) denie dead or for some other reason no attesting wi one attesting dispute as charge the A. I. R 1 writing of o A mor execution.

he denies execution, the Court of fact can consider it *Laturia v. Kamalja*, 1924 Nag 367. Sections 68 and 69 of the Evidence Act read together were intended to lay down how a document which was required by law to be attested, if the provisions of the sections of evidence to intention of the legislature that an should have to prove further that a mortgagor in the presence of at least *Munna Lal*, 14 A. L. J. 1011=39 comes to a finding as to a document having been legally proved within the meaning of this section, it cannot be legally interfered with by the appellate Court, specially when no objection was taken to the admissibility of the document at the time of the hearing *Monch Konda v. Achu Appalaram*, 22

witness is
Churany
 reference to
 proving the attestation of at least one attesting witness when all the attesting
 witnesses are dead, are sufficiently complied with by proof of the handwriting
 of the scribe and by the fact that some of the attesting witnesses signed by the
 pen of the scribe *Krishna Jiva Bhanth*, 31 A 615-10 A L J 217 All

as the document had been admitted by one of the executants in certain other
 document tendered in evidence and proved *Hell*, that the evidence adduced
 did not comply with the requirements of s 69 of the Evidence Act and the
 document could not be taken to have been proved *Gobandhan v Hari Lal*,
 11 A L J, 379-19 Ind Crs 121-23 A 561 In England, it is recognized
 that there is a distinction between proof of the handwriting of a person and
 presumptive and other evidence that a document had been executed The Indian
 Law does not appear to allow a party to rely on presumptive or other evidence

the attesting witnesses had been duly accounted for *Suamudin v Haniz*,
 11 Ind Crs 225, see also *Amjerumal v Kiphara*, 11 L W 563 This section
 no doubt requires proof that the signature of the executant is in his handwriting,
 but this fact may be proved indirectly by a contemporaneous admission of
 execution made by an executant or by other relevant facts, such as his subsequent
 conduct, just as well as by the evidence of a witness who directly swears to his
 signature Such an admission recorded by the Sub-Registrar in his registration
 endorsement can be accepted in evidence as proof of execution *Ayudha v*
Jagannath, 20 O C 18-38 Ind Crs 605 In the expression "it must be proved
 that the attestation of one attesting witness at least is in his handwriting"
 "handwriting" could probably be held to include, in the case of marks man,
 his mark *Whitley Stokes*, Vol II p 694, see also *Pran Krishna v Jadunath*,
 2 C W N 603

absence of the witness beyond the jurisdiction of the Court (*Mills v Trust*,
 11 Johns (N. Y.) 121), or his absence in a distant part of the country, are not
 sufficient *McIord v Johnson*, 4 Bibb (Ky) 531 The absence of the witness
 is sufficiently accounted for if, after diligent enquiry, he cannot be found
Clark v Sanderson, 3 Binn, Pa (192); *Cunliffe v Sefton*, 2 Dist, 182, *Crosby v*
Percy, 1 Taunt 364, *Dudley v Summer*, 5 Mass 438, *Morgan v Morgan*,
 11 Bing 359, *Evans v Curtis*, 2 Car & P 296, *Bright v Doe*, A & D
 22; *Whitelock v Musgrove*, 1 C & M 511 What is due diligence must, of
 course, depend somewhat upon the circumstances of each case The proof
 should show satisfactorily that a reasonable, honest and diligent inquiry has
 been made After such proof is given, the decision of the question depends
 to a considerable extent upon the so
Burton 11 Johns (N. Y.) 64 Such
Trust, 3 J
 witness, if
Jackson v
 treated as

What is sufficient proof of the search for an absent witness, in order to admit
 secondary evidence of the signature, depends somewhat upon circumstances.
 Where the witness has a fixed residence within the country the rule should be
 more strict than where the defendant had no fixed residence, was a labouring
 man, and it was
 to use
 words that
 282
 party,

or that sue
be enforce
Thannesa
must be pi

, the rule will not
ies § 529; see al a
attesting witness
d Crs. 637.

Witness' name unknown, through loss or illegibility of Document. 'It is clear that where the very name of the attester cannot be ascertained, the attester is unavailable for the purpose of furnishing his testimony. This situation occurs where the document is lost; here the proponet is exempt from producing the attester [*Keeling v Ball*, Perke Add Cas 88; *Re Phibbs* (1917) p 93]; unless of course the name has otherwise before trial become known to the proponet, for in that case his ti the document before him, might document did or did not once exist

exists" Wigmore § 1314 The known but the person cannot
Giles, 1 E & B 642.

Causes of unavailability—Illness—Failure of Memory etc When the attester is at the time of trial so ill or so infirm from age that it is impracticable, without his production attendance in Court, *Taunt. 16, contra* *Harrison v Bh* far as it involves a mental disability organic in its nature, and analogous to insanity, should

tion purely as to the identity
Wigmore § § 1315, 1316.

If the attester
admissible The
interest. *Suira*
has since become
because it speaks as

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Admission of execution by party to attested document

Principle For the purposes of proof, a judicial admission of the opponent — i e an express agreement for the purposes of the trial—has the same effect as a

name. Wigmore § 1296

Scope of the relate to admission p 894. The term party in the course by the admission of *Budha v Serican*,

evidently distinguished from the execution by witnesses, which is known as "attestation." *Jhama v Decluz*, 2 N. L. R 10 (16). Section 70 of the Indian Evidence Act lays down that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against

Now the question is as to what is meant by "admission" on these means the consent to the contents of the document, no this, there he admits that he can be taken to mean that he assents by him, but he has not been compelled to admit execution of the document, he is taken to admit that he is the author of the Transfer of Property Act, 1882, 1296-17 B 137-76 Ind, 7 C W N 263 So section 70

of the 12th
attestation
transfer of

enira v Nilar, 7 C W N 1.
Satishchandra Mitra v
Woolhoffs J said "That
admission on that even when
of execution or signing
has the meaning of it."

Ind Cas 984, *Pabau Khan v Badal*,
Nanhi, 64 Ind Cas 11-19 A L J 855
3 Pat 317-74 Ind Cas 100-1923 P
C L J 114-74 Ind Cas 178, *Aung Rhi v Ma Aung*, 1 Rang 557, *Nageswar*
v Bachu, 4 Pat L J 511-53 Ind Cas 79; *Priyanath v Bissessar*, 1 C
W N 603, *Dhruva Lal v Shambu*, 47 Ind Cas 9 But in a recent
case the Judicial Committee of the Privy Council has held that this section
1 *Hira Bibi v Ram Hari*, 30 C W
A L J 815-52 I A 362-20 W
1144-42 C L J 148-98 Ind Cas
R 1925 P C 203 This section applies
Ala Po Gu v Ma Min Thu 5 Rang

ad to the
the Indian
law to be

444-44
mat
all,

Chandra v Harilash Chandra, 36 C L J 373 The admission by a mortgagor
of the execution of a mortgaged deed before the Court does away with the necessity
of proving its execution but not with the necessity of such attestation as is
required by law *Pandurang v Balaji*, 14 C P L R 42 Under this section,
sufficient proof as against the
proposition that the document

4 Pat L J 511, *Nibaran v Ram Chandra*, 22 C W N 445-44 Ind Cas 984
document cannot be
of its execution
178-38 C L J 114,

for his purposes, it is also (so far as he is concerned) genuine for the proponent's purposes. The execution thus not being disputable, the rule requiring the attesting witness to prove it does not apply. *Ugmore* § 1297

Proof when attesting witness denies the execution

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Principle The notion of the rule of Preference for the attesting witness is that of the general desirability, in furtherance of truth, of obtaining his knowledge on the subject. What may be the tenor of witness's testimony, remains

of the side . . .
 . . . by . . .
 evidence the execution, the present rule says nothing about the consequences—whatever any other rule may say. The present rule's force is absolutely spent when witness is produced for examination. So the attesting witness's positive denial of the facts of execution, contradicting the statements implied or expressed in his attestation leave the proponent still free to prove by other testimony, if he can, the facts of due execution, a permission demanded not only by principle but also by policy in as much as the proponent might otherwise be defeated of his rights by a corrupt attester. *Ugmore* § 1302

Scope of the section The party seeking to prove an instrument may examine his witness as to the acts of execution performed, the date, the place,

15 Pick Mass 534 If a party, who calls a witness to prove a particular fact, be disappointed in the result of the testimony, it is competent for him to prove the fact by other testimony. 3 Stark Et 1692 If the subscribing witness fails to establish attestation, of law, not testimony

534 In other words, the execution of the instrument, even though it be a Will may be established by competent evidence against the positive testimony of the subscribing witnesses. *Matter of Gottrel*, 95 N Y 329 The party who would establish a deed must lay his ground work by the production of the subscribing witnesses if the execution of it, they fail to establish the positive rule of the law, is not to be established by other evidence, he is permitted to establish

attestation or not. *Nort* Ev 254 When in a mortgage suit it was found that one of the attesters was dead and the other either denied or did not recollect the execution of the document, the execution of the same can be proved by other evidence. *Lakshman v Gokhul*, 1 Pat 54—(1922) Pat 415—70 Ind Cas 298 A statement of the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of this section and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses. *Dinabandhu v Sanatan*, 48 Ind Cas 624 "If one of two or more attesting witnesses being called, denies or does not recollect the execution of the document it is not very clear whether other evidence can be given to prove it, if there be another attesting witness alive, subject to the process of the Court and capable of giving evidence,

71. who is not produced? *Field L 7th Ed 227*. It is not intended by enacting this section to depart from the rule of English law that the evidence of the other witnesses should not be introduced unless the absence of the other attesting witnesses is satisfactorily explained in the case where one of the two attesting witnesses has been called and has denied execution. *Ayemanti v Mahammad*, 49 C L J 347 = A I R 1929 Cal 44. So other evidence under s. 71 cannot be admitted where provision of s 68 have not been complied with. *Banuar v Gopi*, A I R 1931 All 411 = 1931 A L J 342.

given false testimony
all which was attested by
four witnesses, two of whom had died and the other two deposed practically in favour of the objector, *Mookerjee v Breachcraft JJ* observed. This however, does not compel the Court to pronounce against the Will. It was ruled in the case of *Nubo Kishore Dass v Joy Doorga Dass*, 23 W R 189, that the mere fact that attesting witnesses to a Will have repudiated their signatures, does not invalidate the Will, if it can be proved by evidence of a reliable

consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with; in other words, the Court may, of the case evidence is of Court and the Will.

also *Re Succet*, (1891) P 400; *Re Orens*, 29 L R Ir 451. So, the test of a document is not necessarily at the n *v. Anjumanunnissa*, 48 Ind Crs 53. 19 Ves. Jr 494, 507, Lord Eldon said

namely, that the party did not execute it." *Per Lord Kenyon, C J* in *Ley v Ballord*, 3 Esp 173 note "The attesting witness's testimony is not indeed conclusive for the party may go on to prove him untrue-worthy and may call other witnesses to prove th
v Harringworth, 4 M. & Glascock, Skinn 413; *Austin* N P 264, *Richie v Oatfield*, *v. Bradbury*, Buller N P 26. hands, it was objected he if you call one v he prove against you him to call other *Wignore* § 1202. absence of recollection evidence *Sheik K Balram v Kamali* 347 = A I R 1929 Cal 441. See also *Coles v Coles*, L R 1 P. 70; *Doyle v*

v. Hodson, L. R. 1 P. 362; *Dayman v. Dayman*, 71 L. T. 693, *Pillington v. Gray*, (1899) A. C. 401; *Goodison v. Goodison* (1913) 1 Ir R. 219. Where the attester denies attestation and the other attestors are dead, what is required under s. 71 is only proof of the presence of attesting witnesses. *Lalla v. Lalla*, 74 Ind. Cas. 969. *Sankar Dayal*, positive and there is nothing to throw doubt on it. *Wyatt v. Berry*, (1893) P. 5; *Philp. Ev.* 502. Where the only living attesting witness of a document was illiterate and on being examined denied execution, *Hell*, that the document could be proved by other evidence. *Balraj Prasad v. Gambhir*, 29 Ind. Cas. 500. At the time of its execution, *Gouri Shankar*, 39 I. witness is considered hostile by the party taking his stand on the document, does not relieve him from the duty of examining him as a witness. *Gobinda v. Pulin*, 31 C. W. N. 215. *Tula Singh v. Gopal Singh*, 1 P. L. J. 369. If he denies the execution, other oral evidence is admissible to prove execution. *Basdeo v. Rashbehari*, 104 Ind. Cas. 441; *Lakshman v. Gopal*, 1 Pat. 151; *Srihi Mukhi v. Monmohi*, 1425-103. *Krishna J.*, 29 Bom. L. R. 1425-103. *Belbin v. Steele*, 1 S. & T. 118; *Philp. Ev.* 502.

obviously cannot excuse, for it cannot be ascertained except after production to testify.—When it appears after such production, other principles come into play, (a) the witness may adopt his attesting signature as record of past recollection, and upon the faith of it verify the facts of execution as thus known to him be otherwise of execution; by other qualified persons. *Wigmore* § 1315. The first question is, may not the attester, though not actually recollecting the circumstances, adopt his testimony on the faith had he not witnessed the Recollection. *Vide* s. 159

circumstances of the execution prove the facts of execution by other witnesses. Because it could never have recuted, when- attending the ill, not because a requisites of the law, but because they would most likely prove or disprove them, and

since the they are are circum- stances al praesumuntur rite esse acta.

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

Principle and Scope. This section embodies section 37 of Act II of 1855. For a long time it was held that when a document was attested, one at least of the attesting witnesses must be produced. *Doe v. Dumford*, 2 M & S 62. In *Ward v. Ferris*, 2 Camp 282, 284, Lord Ellenborough said that "it did not depend on the nature of the deed to be proved, it must depend upon the possibility of procuring the attendance of the attesting witness, not upon the testimony he is likely to give." See also *Higgs v. Dixon*, 2 Stark 180; *Street v. Bartlett*, 5 C. B. 542. But as this worked great hardships to suitors the Common Law Procedure Act 1854 (17 & 18 Vict. C. 125, s. 26) and the Indian Evidence Act of 1855, introduced the present reasonable practice. *Nort. L.* 235. These Acts restricted the rule to documents required by law to be attested. *Re Riche*, L. R. 12 Ch. D. 35. In England the Common Law Procedure Act, has been replaced by Stat. 28 & 29 Vict. C. 31, s. 1, 7. So now in England, an attested document, to the validity of which attestation is not by law necessary may be proved by admission or otherwise as if there were no attesting witnesses. This rule is applicable also to Ireland. *R. v. Mallon*, 12 Ir. C. L. R. 55. This

Identity of Party and document. In order to prove a document the identity of the writer or marksmen with the defendant or other person alleged to have signed the document, may have to be given. *Phip Ev* 7th Ed 504. In *Neuson v. Luster* 17 Ill 175, *Trumbull* J said "I have no hesitation in holding that proof of the handwriting of the grantor to a deed furnishes altogether more satisfactory evidence of its execution than would proof of the handwriting of the subscribing witness." The identity of the party may be proved by showing that he had spoken of the (P 613) or by proof of similar especially if the name be uncor. B 881, *Simpson v. Dismore*, 9 M & W 47; *Phip Ev* 7th Ed p. 504. The identity of the document, whether attested or not, may also have to be shown, e.g., when the defendant, pursuant to notice, produced a document which the plaintiff denied to be the contract in question, parol evidence was received to determine the point. *Fraude v. Hobbs*, 1 F & F. 612; *Phip Ed* 7th Ev 504.

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

*[This section applies also, with any necessary modifications, to finger impression.]

* This paragraph was added to s. 73 by the Indian Evidence Act, 1899 (5 of 1899).

73

Principle In proving a document or evidence offer them-selves, first testimony by or some circumstance of the kind of hand second mode there is :

(1) "The first mode is based on comparison, and the second mode is based on the opinion of an expert."

tribunal directly :

Wignone § 1996

to afford a fairly trustworthy inference, must of course be genuine, and also be numerous and representative enough to serve as an adequate basis for inference to the general style *Ibid*

Scope of the Section By section 45, handwriting and signature of a person can be proved by an expert Section 47 admits the opinion of any person, acquired to be written In addition

under ss 45 and 47,

with an undisputed one

in dispute it to be compared with the handwriting of the party to be proved comparison is the more satisfactory. If it be proved genuine to the satisfaction of the Judge, with whom the *Ridgway*, 1 F. & F. 270, the comparison *Times* 223) A party may undertake purpose of comparison (*Doe v Wil* be less satisfactory, as a person writing with the very view of defeating a comparison. *Cobell v. Almonister*, could only be made between the disputed handwriting and the original. But the present

North Ev.

doubted in

have decided

admission

comparison with the

standard must be proved

"The difference between letters which have been received in correspondence, and the handwriting of the witness's hand" it was argued in *Mudd v. Suckermont*, 2 P. & D.

in a condition (all

selected) or even

Best Ev § 238

in *Mudd v. Suckermore*, (1836) 2 P. D. O. 20, the inconvenience of collateral issues already exists where a witness speaks to the genuineness of handwriting from an impression derived from a letter he has received. The correctness of this knowledge depends on the genuineness of that letter, and even where he says he saw the party write, his knowledge depends on the issue whether or not he did see the party write. As to the second objection Mr. Best says "It is not always easy to obtain fair specimens, and should such be produced, it would be competent to the opposite party to encounter them with true ones." Best on Ev § 238. Concerning the third objection, Mr. Best says "It does not seem satisfactory logic to protect a jury which can rely on availing themselves of that means for the investigation of truth because other juries might, from want of education, be disqualified from so doing; if some men are blind, that is no reason why all others should have their eyes put out." Best on Ev § 238. This last argument against jurors loses all its force in India in as much as no civil cases are tried here by jurors and a few important criminal cases only are tried with the help of

by compa-
ny juxtaposi-
tion of the
witness on the other, it has been pointed out in the latter case the characteristics of the standard are indistinct, shadowy and uncertain, while in the former they appear in

paper in

ceived, of c.

disputed i

made in hi

v. *Woolfor*

held that i

cause) "has been that the standard writing must be one used in and connected with the case. But how can this be held necessary when we look at the object of the standard. It is of no consequence what the writing you compare is; all you want is a genuine handwriting, and it is as respects the nature of the evidence not material what instrument it is, nor whether the paper be blank in all except the signature, nor whether the writing be connected with the case or not."

In England the controversy was set at rest by the enactment of Stat 17 & 18

which allow comparison of hands

by juries as well as under this

act, first, that any writings, the

not of the jury, but of the

4 F. & F 490).

Muk, 4 C & P

any one, the J.

Messell, 3 F & I

lay witness is c

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3. them, the jury may compare them as well as any body else and any two people may think differently" *Per Yates J. in Bqookband v Woodley*, Peake N. P. 21 Note Similarly in *Doe v. Suckermore*, 11 A & E 749, *Denman L C J* said "If the proved document and the controverted are both in Court, and the witnesses speak to their resemblance or difference from immediate observation, they seem to perform a task for the jury which every one of them, even though illiterate, might well perform for himself" So it is clear that on principle, comparison by a lay witness should not be allowed, even in the presence of the tribunal. But this rule does not apply in the case of an expert witness, because "he does what possibly the jury may be incompetent to do" *Ibid*; *Higmore* § 1997 The question of comparison of signature is distinct from question of admissibility *Khyruddin v Emperor*, 53 C 372=92 Ind. Cas 412=27 Cr. L J 266=A I R 1926 Cal 139 The word "purports" in this section does not limit the scope of the section to such documents only as are signed or contain some intrinsic statements of the identity by a party to be in the handwriting of . . . proof be compared with other writing : satisfaction of the Court to have been made or written by that person *Iccra Raghava v. Soura Aiyanger*, 35 M L J 608=41 Ind. Cas 688=24 M L T 477. In delivering the judgment in the case the Court observed "This case turns solely on the Evidence Act. . . . *Kumar v Empe Batchelor JJ* it are inclined to the scope of the statement of th is necessary to writing . . . In used is "alleges the two words the two must be

ascribed by the prosecution to a particular

person, then the regard to the ad disputed writing, have been written or made by the accused *Emperor v. Ganpat Balkrishna*, 14 Bom L R 310=15 Ind Cas 649=13 Cr. L J 505 But in *Barindra Kumar v Emperor*, 37 C 467=14 C W N. 1114 at p 1138, *Jenkins C J* said "In applying the provisions of section 73 of the Evidence Act it is important not to lose sight of its exact terms It does not sanction the comp which the shall be attributed, purport to must stat specifically paragraph of contras son In Sessions with the submission not an vve learned & section, ha out having think this times as a mode of proof hazardous and inconclusive, and especially when is made by one not conversant with the subject and without such guidance as

might be derived from the arguments of counsel and the evidence of experts. In *Sreenivthy Phoolan Bibee v. Gobind Chunder Roy*, 22 W. R. 272, it was said by the Court that 'a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution.' In this case no expert has been called to assist the Court, and not because no expert was available; there is, it is well known a Government expert as to handwriting and certain of the documents in this case bear a stamp which shows that they have been submitted to him. It is true that the opinions of experts on handwriting meet with their full share of disparagement at times, but at any rate there is this use in their employment that the appearances on which they rely are disclosed, and can thus be supported or criticised, whereas an opinion formed by the Court is not so. And see also *C. 516*, 30 Nag. is one or other proof alone, and *Cas 741*;

the purpose of comparison of handwriting under this section it is his duty, under section 298 of the Criminal Procedure Code to find whether these documents are admitted or proved. The record of the case should contain a note of such finding. *Queen-Empress v. Tulsi*, Rat. Un Cr C 491; *Queen-Empress v. Lal Singh*, Rat. Un Cr C 152. But in a trial by jury, where the Judge allowed certain documents to go upon the record, which were not proved under the requirements of s 73 of the Evidence Act, for the purpose of comparison with the disputed handwriting, held that there was no such irregularity of procedure as to warrant an interference in revision. Whether the documents were proved or not, it was for the jury to decide. *Queen-Empress*

98. The Court has to come to a conclusion. *Gondu v. Tularam*, A I R 1930 Nag 27. genuine signature

English law and origin of the rule except when the witness wrote the its nature comparison;—it being the comparing the writing in question some previous knowledge (*Doe v. Sukermore*, 5 A & E 731, per Patteson J), the law until the year 1851, did not allow the witness, or even the jury except under certain special circumstances, actually to compare two writings with each other, in order to ascertain whether both were written by the same person. *Taylor* excluding proof of the hand-writing by The first was the case of a document tent for the Court and jury to compare the in the case for other purposes, and which were admitted or proved to be in the handwriting of the supposed writer. *Best*, Ex § 239, *Griffith v. Williams*, 1 C & J 47; *Doe d Perry v. Newton*, 5 A & E 514. The case of *Perry v. Newton*, *supra*, decided by the Court of King's Bench in 1836, is always cited as the leading case to support this exception, although the exception did not arise in the case at all. On the trial of an jury, that they might compare them with the signature in the will. The letters were not in evidence for any other purpose. The Judge refused to allow them to be put in, and on appeal the full Court sustained the ruling. *Lord Denman*

3. C. J. said: "This is a point on which we ought not to raise any doubt... The comparison is unavoidable. There being two documents in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the

persons acquainted with the handwriting of the supposed writer, either by having seen him write or by having held correspondence with him, the law, acting on the maxim *lex non cogit impossibilia*, allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one" *Best on Ev.* § 240; *Roe v. Raulings*, 7 East. 282 (n); *Doe v. Taiter*, R & M. 141; *Doe v. Davies*, 10 Q. B. 314; *Moorewood v. Wood*, 14 East. 327; *Barr. v. Harpar*, 1 Holt 420; *Brune v. Raulings*, 7 East. 282; *Crauford and Lindsay Peerages*, 2 H. L. C 537; *Solita v. Yarrow*, M & R. 133, *Bromage v. Rice*, 7 C & P. 548. With these exceptions comparison was not allowed in England. *Macpherson v. Thoyles*, Peake N. P. 29; *Brookford v. Woodby*, 9 Peak. N P 30; *Garrels v. Alexander*, 4 Esp. 29; *Brookford v. Woodley*, 9 Peak N P. 30, *Gancols v. Abuandro*, 1 E-p. 37. In *Engleton v. Kingston*, I never heard of those who had never seen evidence in .. erequently received

of the jury to prove comparison of metropolis the jury are composed... conclusions from such evidence. For my part, I have always been inclined to admit it, and shall do so in this case." See also *Rivett v. Braham*, 4 Term. R. 497, *King v. Cator*, 4 Esp 117

The subject at last came before the Court of King's Bench in the well known case of *Mudd v. Suckermore*, 5 Ad. & E. 703. In that case the Court... years after dissenting "Compari- ion of the ; and such submitted

those manu- calling on reception of ch compari-

sons were not allowed in India *Annigurubila v. Kristnasami*, 1 M. H. S. C. R. 457.

In 1865, Stat. 28 & 29 Vict. C. 19, was passed, section 8 of which runs as follows: "comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of genuineness, or otherwise, of the writing in dispute" Section 1 of the same Act provides that the above enactment, in common with certain other clauses relating to evidence,—shall apply to all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence, whether in England or in Ireland" *Taylor* § 1869 The Indian Evidence Act found place on the Statute Book in 1872.

Comparison of writing etc., meaning of All evidence of handwriting, except where it is a comparison of handwriting.

ness entertains, mind, derived from some previous knowledge of the hand *Woodward J in Travis v Brown* 43 Pa St 12 (Am) But this is not what is properly known as comparison of handwriting "By comparison is meant," says *Starkie* "a comparison by the juxtaposition of two writings, in order by such comparison, to ascertain whether both were written by the same person" *Starkie* *Ev Part IV* p 654 "Comparison of handwriting is where other witnesses prove a paper to

mind, as an external visible and tangible object is distinct from a mental impression or memory. It is the distinction between what is objective and what is subjective *Woodward J in Travis v Brown*, 43 Pa St 12

The genuineness of the standard Wherever proof of handwriting by evidence that the standard of comparison is obvious Under the rule of a disputed writing the opinion of the Court to be given as to the genuineness

out by the collateral evidence used as a

the person write the same, 13 S W R 330 (Am) (certainty), should be given to a jury In a case of perjury

record, is presumed to be genuine, and may be used as a standard without further proof *Saunders v Dawson*, 2 Mart 203 (Am) "When the identity of anything is fully and certainly established, you may compare other things with it which are doubtful, to ascertain whether they belong to the same class or not, but when both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous, and more likely to bewilder than to instruct the jury." *Per Coulter J in Dupas v Place*, 7 Pa St 423 (Am) A document to be admissible against an accused person should be proved to be a document

3. in the handwriting of an accused person by comparison with an admitted or proved specimen of his handwriting, in the light of the testimony of expert witness *Pulmbehari v King Emperor*, 16 C. W. N 1105=16 Ind Cas. 257, *Queen-Empress v. Tulsaji*, Rat. Un Cr. C. 491.

are secondary evidence *Ibid* But it is held in *Massachusetts* that magnified photographic copies of the signature in dispute and of admitted genuine signatures of the same person are admissible in evidence when accompanied by competent preliminary proof that the copies are accurate in all respects except as they are capable" and *Herrick* / "of affording some

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accuracy of the copies produced by the art of the photographer, we are unable to perceive any valid objection to the use of such proposed representations of original and genuine signatures as evidence competent to be considered and weighed by a jury" *Marcy v Barney*, 16 Gray, 160 Letter press copies might under some circumstances be useful as well as the originals, or in default of them *Wigmore* § 2019.

Any person whose handwriting is in question may be required by the Judge to write in his own hand a specimen of his handwriting to be compared with the document in question *Doed Devine v Wilson*, 10 Moo P C 501, 503; *Cobbett v. Kilmister*, 4 F. & F. 490; *Taylor* § 1871 To prove the handwriting of a person in a particular document a party may ask the Court to have the handwriting of that person to be taken in Court for the purpose of comparison The result of the comparison of an issue arising in the case and is quite sufficient to decide the question of admissibility or otherwise of the evidence in the province of the jury and not of the Judge *Rhyttruddin v Emperor*, 42 C L J 504

J. 79; Basant v Emperor, 6 P 304=104 Ind. Cas 626, *Emperor v. ...*, 46 ML 715=69 Ind Cas 374.

Comparison of handwriting—Value of A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. *Sarajm v. Hari Das*, 26 C W. N 75, *Balakram v Md Said*, 77 Ind Cas. 872. In *Phoode Bibee v. Gobind Chunder Roy*, 22 W. R 272, it was said by the Court that the truth which ought to be ascertained by the comparison of writings has consequently been deemed a mode of ascertaining truth which ought to be

used with very great caution (*Nabin Krishna v Basih Lal*, 10 C 1047 (1051), and 2-10 W. R. P C 16), specially comparison. *R v. Silverlock*, 516; *Das v. Suchermore*, 11 A & 4 M 1 A 67-7 B L R 216-1-20 I A 95; *Ambika Charan Galstun v Sonatun*, 78 Ind. R 529, *Ibdulla v Gannu*, 11 B an v *Gurish*, 9 W. R 150. dissimilarity of signatures, a particular signature is not the signature, yet resemblance genuine *Sarajini v Hari Das*, 26 C W. N. 113-31 C L J 373, *Batahu v Parmeswar*, 61 Ind Cas, there is room for suspicion that

ally written in the character of a person's signature is generally of uniform appearance, and the signature of a person is thus a facsimile that one is a perfect match to the other in every respect. There is generally diversity in the marks of the pen, the size of the letter, the level of the signature and space it occupies, that stands as a guard over the genuine signature and *Sarajini v Hari Das*, supra, see also *Colledge J* in test of genuineness ought to be some other specimen or specimens but to the general character of the writing which is impressed on

or position, as for instance the writer sitting up or reclining or the paper being placed upon a harder or softer substance, or on a place more or less inclined—nay, the material as pen, ink etc., being different at different times are amply sufficient to account for the letters being made variously at the different times by the same individual. Independently, however, of anything of this sort few individuals, it is apprehended, write so uniformly that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person" *Galstun v Sonatun*, 78 Ind Cas 668-A I. R 1925 Cal 485

PUBLIC DOCUMENTS.

74. The following documents are public

Public documents,

documents.—

(1) documents forming the acts or records of the acts—

- (i) of the sovereign authority,
- (ii) of official bodies and tribunals, and
- (iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country,

(2) public records kept in British India of private documents.

Scope of the section This is important because certain documents are distinguished from private documents. It is not always easy to determine the meaning of the word "public documents". In *Sturla v Freccia*, 11 App. Civ. 623, the question arose as regards the meaning of the word "public documents". In delivering the

Royal proclamations, and all other acts of State *Pouell Ev 248* In this connection it should be borne in mind that the term 'public' as applied to documents is used in English in the statements contained in as a form of testimony, either persons, of the facts stated *mean that the document is one of those originals of which are kept in some*

strangers
must be in
a register of
abduction
document
persons of
Evidence
only in the second sense. All descriptions of public documents have
characteristic, that they are kept in some special custody and provable by means
of a copy without production of the original. *Willis Ev. 2nd Ed. 407*. A public
document is one prepared by a public servant in the discharge of his public
official duty. The mere fact that it is kept in an office does not lead to the
inference that it is a public document. *Madhab Din v. Karar Singh*, 107 Ind.

Cas 618=A. I. R. 1928 Lah. 640; see also 105 Ind. Cas. 353=A. I. R. 1928 Nag.
93. Where a letter received from the Comptroller of the Military Accounts in
reply to the warrant of attachment acknowledging the same was relied on to
prove knowledge of the judgment-debtor as regards the existence of the decree,
held, that the letter was a public document under s. 74 of the Evidence Act and
that the same did not require proof. *Sheikh Dlu v. Hua Lal*, A. I. R. 1928
Oudh. 488. If the law requires that . . . Revenue . . .
record, such pedigree in the Revent : . . . A. I. R.
1928 Lah. 211=103 Ind. Cas. 182. Da. . . 98 Ind.
Cas. 471=A. I. R. 1927 All 52. C . . . Deputy
Collector under s. 40, Bengal Tenancy . . . 1926
Pat. 436=95 Ind. Cas. 966. Registers . . . Act,
. . . registers
. . . 5 Ind. Cas. 955; 69 Ind. Cas.
. . . and death nor purchase slips
Cas 82. . . 22 C. W. N. 822; 17 Ind.

Acts or Records of the Acts In

any other officer furnishes for the information of the Public Prosecutor? It is true that the police officer acts in performance of a statutory duty, but section 74 makes no distinction between such acts and other official acts." When a Civil Surgeon reports to a Magistrate as to the age of a person, he is merely giving his expert capacity for the use of such a document. 1 Luck 733-108 In re in the prep betw L J notification that was not an 'act' or 'record of act' of a public officer, the meaning of this section Velayudam v Emperor, 1929 M. W. 11, 12, 13 Ind. Cas 509-30 Cr L. J. 483.

Statutes and state papers. Statements and recitals of public acts, contained in public statutes; Royal proclamations (*R. v. Sutton*, 11 Q. B. 177).

74.

Radcliffe v. Union Ins. Co, 7 Jones, 38; *Talbot v. Seeman*, 1 Cranch, 1, 37, 39; or Parliamentary Journals as to all matters properly before either house are public documents. *Phil. Ev. 7th Ed. 324.*

ada Mahomed v. Danie
and written statement
certified copy of the
document whereas the

whether the
clear that
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been admi
ness, howe
been for a
Calcutta F

nature, that they can be proved by copies to the same extent as records, and are subject generally to the same rule of evidence. Indeed, henceforth, for the sake of convenience, the general term records shall be used to include all the documents just mentioned. The record of another Court may be proved by a copy. *Chief Baron Gilbert*: "Records, to which every man has a right, justice, to which every man has a right, transferred from place to place to

or accounted for like any other document. *Bayley v. Wylie*, 6 Esp. 200. although in strictness of records for all Courts primary removal was by

Case, 5 C.
proceedin
Writs of

be proved by actual production, though after their return, they become matters of record, and are consequently provable by copies B N P. 231 With respect to writs of summons under the Rules of the Supreme Court, they may be lost, by copies by the be lost, by as documents they relate.

R. v. Scott, L. R. 2 Q. B. 415-46 L. J. M. C. 259. The pleadings in an action

forth; and so much so that a party cannot be admitted to plead that the things record, as long solute verity." by a decision, as v. *Gannon*,

the identity of the person who gave the deposition. *Brayaballav v. Akhoy*, 30 C W N 954-93 Ind Cas 15 Proceedings of a Court of Justice may be

75. Private documents. 75. All other documents are private.

Private documents
 classed as Public & Private : as to their u
 document *Phip* Ev
 documents are private docu
 contract, memorandum, I
 of the private document
 Jones § 201. An abstract statement prepared by a patwari even though his
 on papers in his possession and filed in a suit is only a private document
Sheo Das v Sheo Dayal, A I R 1930 All 712=128 Ind Cas 770

76. Every public officer having the custody of a public
 Certified copies of document, which any person has a right to
 public documents inspect, shall give that person on demand :
 copy of it on payment of the legal fees therefor, together with :
 certificate written at the foot of such copy that it is a true copy of
 such document or part thereof, as the case may be, and such
 certificates shall be dated and subscribed by such officer with his
 name and his official title, and shall be sealed, whenever such
 officer is authorized by law to make use of a seal, and such copies
 so certified shall be called certified copies.

Explanation. Any officer who, by the ordinary course of
 official duty, is authorised to deliver such copies, shall be deemed
 to have the custody of such documents within the meaning of this
 section.

document
 has a right
 There is no
 in British
 ular cases
Field Ev 7th Ed 232. In England, the right to inspect public documents varies
 inspect many
 section saves
 refuse to show
 1257, Taylor
 clude all such
 in the ground
 of state policy
 Bom L R 236
 of the judgment
 the document"
 looked from ou
 a judgment in a criminal case *Ladd v Emperor*, A I R 1931 All 201=22
 A L J. 405 As
 take copies, vide the
 Procedure Code (Act
 Administrator Genera
 1913), the Oudh Land Revenue Act (XVII of 1867), etc

It might have been supposed that, for the lawful custodian of documents
 in official custody, an authority could be im
 office, to furnish copies that should be
 must be the lawful custodian of the particu
 of course exist at the time of certifying
 whose office had expired
 properly certify
 authority test
 nom.
 this custody, however enau

him to speak, not merely to the correctness of the copy, but also to the existence and genuineness of the original. The great obstacle, to the use of a register as evidence of a record of private deed, was the registrar's inability to speak to the genuineness of the deed, and special means to qualify him in this respect had to be provided. This obstacle does not exist for an official record, for it is originally prepared and thereafter preserved in the office, and although it may

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document, within the meaning of s 71 of the Indian Evidence Act. Any person is entitled to inspect the same and to obtain certified copies thereof under this section, for the protection of interest for the N. 125-31 C. 92; *Rez v* 84 Ind Cas 487; see also *Bank of Bombay v* *of Bengal* *is a public* *document* *under* *the* *protection* *of* *the* *Indian* *Evidence* *Act* *Any* *person* *is* *entitled* *to* *inspect* *the* *same* *and* *to* *obtain* *certified* *copies* *thereof* *under* *this* *section* *for* *the* *protection* *of* *interest* *for* *the* *N. 125-31 C. 92; Rez v 84 Ind Cas 487; see also Bank of Bombay v*

inspect public documents is, however, assumed, in s 76 of the Evidence Act. It may be inferred that the Legislature intended to recognize the right generally for all persons, who can show that they have an interest for the protection of which it is

Lab 605.

77 Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies

Proof of documents by production of certified copies
 additional wear and tear upon the document Wigmore § 1215 The usual mode of proving the record of another Court is by production of a certified copy. But the copy is not produced in such cases because it is better evidence than the original, it is received only on the ground of convenience, as a substitute for the original record. The reception of a copy avoids the inconvenience of removing the original record from place to place. *Bullow v Thomas*, 19 Gratt 14, 18. For reasons similar to those applicable to judicial records, documents belonging to any public office need not be proved, but may be otherwise proved. Their removal for production in evidence would delay, and hinder the official use of the files, would make it impossible for other persons to consult

rate. It contains particulars of the area and of the land in respect of which the rate is due. It is a public document within s 74 of the Evidence Act. The *porchas* distributed to the cultivators are also public documents. If produced in original the *jamabandis* do not require to be further proved. The contents of the *jamabandi* could also be proved by the production of certified copies furnished as provided by ss 76 and 77 of the Evidence Act. *Umrao Singh v Ram Singh*, L R 3 A 386 (Rev)—1 U P L R (B R) 26, see also *Ram Lal v, Ghasiram*, 71 Ind Cas 825.

Proof of other official documents

78 The following public documents may be proved as follows —

- (1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,—
by the records of the departments, certified by the heads of those departments respectively,
or by any document purporting to be printed by order of any such Government
- (2) The proceedings of the Legislatures,—
by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government
- (3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—
by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer
- (4) The Acts of the Executive or the proceedings of the Legislature of a foreign country,—
by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor-General of India Council
- (5) The proceedings of a municipal body in British India —
by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body
- (6) Public documents of any other class in a foreign country,—
by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country

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admitted that the

Cockburn, 5 Esp 234; *Vanoneson v. Dorwick*, 2 Camp. 44; *R. v. Gardner*, 2 Camp. 513; *Att. Gen v. Theakstone*, 8 Price 93; *Bradley v. Arthur*, 4 B. & C. 301.

Clause (4) Depositions in a foreign Court are public documents *Harannd v. Ramgopal*, 4 G. W. N. 429=27 G. 639 P. C.; see also *In re Rudolph Stalman*, 15 G. W. N. 1053.

Na Cas. 643.

Clause (6).

such as was in

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purports to testify. Such evidence can be manufactured without any great difficulty and the Courts must be on their guard against its acceptance unless under proper tests

(1897-1901) Vol

the Native State o

Shamsher v. Moh.

this clause are ver

is the Political Agent or the Government of India. *Krishnabai*, 28 Bom. L. R. 1225=50 B. 716=A. I. R. 1927 Bom. 11.

PRESUMPTIONS AS TO DOCUMENTS.

79. The Court shall presume every document purporting

to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by

any officer in British India or by any officer in any Native State in alliance with her Majesty, who is duly authorized thereto by the Governor General in Council, to be genuine:

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it the official character which he claims in such paper.

Presumptions as to documents. Section 79 to 90 deal with certain presumptions as to documents. All these presumptions are based on the ancient and well known maxim *omnia praesumuntur rite esse acta*. (All acts are presumed to have been done rightly and regularly). *Co. Litt. Cb: 332*. The rule is applicable to public and official acts as well as to ancient deeds and private

9. acts Where the acts are of an official nature or require the concurrence of official persons, a presumption arises in favour of their execution. In these cases the ordinary rule is *omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium* (Co Litt 232. *Van Omeron v. Douich*, 2 Camp 44; *Doe v. Evans* 1 Cr. & M 46)—everything is presumed to be rightly and duly performed until the contrary is shown. *Per Stony J. in Bank of United States v. Dandridge*, 12 Wheaton (U. S.) R 69, 70; *Davies v. Pratt*, 17 C B 183; *Broom's Legal Maxims* 723 Upon the same principle proceeds the rule that deeds, wills and other attested documents which are more than thirty years old, and are produced from the proper custody, prove themselves and the testimony of the subscribing witnesses may be dispensed with, although of course it is

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6 Bom L R 750, *Raghunath v. Holi* 1 A I, 191 (1903) The presumption mentioned in this clause is rebuttal, a *presumptio juris et de jure* (1974)=3 Cr L J 32 The word "construed in more rigorous of the Muhammad 110 P L R 1902; *Ramien v. Verappa*, 11 M L T 69 —, there is no a fact," a presumption is option left to the Court, given to disprove it, and t evidence if he can Sections 19 to 20 contain the principal plea r regards documents Of course certain presumptions as regards documents may also be raised under section 114 [Vide s, 114 (ills 1)]

to do it *Harris* presumption that his duty *Per Coleridge J in R. son v. Roberts*, does not arise to official acts and latter deals with former, taking t the acts until the to office may be *Berryman v. Wise*, 4 T R, 366; *R v. Geraun*, 1 Leach 515, *R v. Veielst*, 3 Camp 432, *Marshall v. Lamb*, 5 Q. B 115, *Phar v. Bence* 11 O R 46

suspected that some one personated G, and that his signature is not to be sent to Chambers for the original examination, otherwise the copy so attested

and delivered, must be received and relied on " The same rule is applicable to certificates and other documents as well Certificates and other documents

signature and the seal (where a
Field Ex 7th Ed 141 So if a duly
 of a lease in official custody, had
 have been necessary of the signatures or handwriting of those Commissioners
 officers signing it, such a
 wing an official act done by
 produced from proper custody

having been made competent evidence
 necessarily dispensed with, such
 to a copy *Com v Richardson*, 142
 raising this presumption is that such

ed by law in that behalf The
 to prove the certificate of registra
 ed under this section *Muhammad*
v Soharā 71 Ind Cas 805 But this presumption does not arise where sanction
 under s 196 Cr Pro Code is signed by the Deputy Secretary instead of by the
 Chief Secretary as required by that section *Md Oullah v Ben*, 36 C L J
 180-26 C W N 818-56 C 135 It is doubtful whether this section is
 applicable to copies given before the passing of the Indian Evidence Act *Julir*
Ali v Rajchunder, 10 C L R 469 (476)

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f all peace officers justices
 that they acted in these
 characters without producing their appointments Similarly in *Mo Gohey v*
Alston 2 M & W 206 *Baron Parle* said The rule is that all public officers

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been made by the proper officer

80. Whenever any document is produced before any Court,
 purporting to be a record or memorandum of
 the evidence, or of any part of the evidence,
 given by a witness in a judicial proceeding or
 before any officer authorized by law to take

Presumption as to
 documents produced
 as records of evidence

80. such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

es sanction to the maxim *omnia pro-*

regular. *Lawson Pre. Ec. Rule 10.*
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Ev 261.

Scope of the section. The statement as to which this section says that certain presumptions in accordance with the kind of evidence, case of certain operate to render

omits to claim
so, does not arise
copy should also
in a specified proceeding.

106-33 C. W. N. 1191-119 Ind. Cas. 192-A I R. 1959 Cal. 617 (F. B.)

deposition preclude the presumption that the copy is a true copy. *Sorajya v. Mata Din*, 7 O. L. J. 542-60 Ind. Cas. 437.

if recording depositions
P. Code and in criminal
of Order 18, runs as
evidence of each witness
the Court, by or in the
evidence of the Judge,
ut in that of a narrative,
e of the Judge to the
same, and shall sign it
down in a language

different from that in which it is given, and the witness does not understand

the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given." As regards the effect of non compliance of the formalities laid down in these two sections, S. C 825—
 . . . : tes to the
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 . . . is not read
 over to the witness in the presence of the Judge Upon that it is argued that the deposition is not legally a deposition at all and the Judge was wrong in allowing the cases
 . . . Emperor,
 . . . interpreted
 . . . he conten-
 tion advanced, unless the rule laid

for instance, *Empress v Jogendra Nath* 43 C 240=18 C W N 1242 Speaking for myself, however, with great respect I am not sure that I clearly understand the principle of those decisions Under section 80 of the Indian Evidence

malices for these two rules renders the deposition inadmissible in evidence against the deponent on his subsequent trial for perjury Section 91 of the Evidence Act excludes the oral evidence of its contents *Emperor v Nauab Ali*, 51 C 236=25 Cr L J 1027=81 Ind Cas 803=A I R 1924 Cal 705, See 32, *Mohendro v*, 461=50 Ind. 31, *Kamatchi v*, 38 understands ce as a sufficient id over by the or 23 C W. N

he appears by his section is to give the witness an opportunity of correcting his statement *Ramdhani v*, R 393 *Amrita*, v *Sania*, W N. L J 811; 3=27 Cr. *Rahaman*, ence Act ce should of them being that the Magistrate shall sign it only after it has been read over to th

0. witness in the presence of the accused and the accused may have an opportunity, 12 Bur L T 167=11 Emperor, 12 Bur L T 167=11 506; see also *Ngat Sam v K. E. U* the Criminal Pro Code does not shall be taken and attested by the Magistrate in the presence of the accused What it provides is that the deposition, if so taken and attested, may be put in evidence in the Sessions trial Therefore, that the deposition was taken and

Lah 632=125 Ind Cas 892=31 P L R 472=A. L R 1930 Lah 714

Confession of accused taken in accordance with law A confession by an accused recorded by a Magistrate is admissible under this section, even though the Magistrate who recorded it, ultimately came to the conclusion that he had no jurisdiction to try the case *Emperor v Banko Behary*, 10 C P L R Cr 16 If, when a document is tendered in evidence at a trial purporting to be a confession of the accused, it is found to contain the memorandum required by s 164(3), a presumption arises under this section that all the necessary formalities purporting to have been performed have in fact been performed and the document is admissible in evidence without further proof If, however the memorandum does not appear or is defective the document is inadmissible

such a defect would be curable If the explanation had not in fact been the statement could not be held to have been duly made and s 533 cannot be

Cas 257=23 Cr. L J 673, *Queen Empress v Sundar Singh*, 14 A 261 Confessional statement Section 80 of the Evidence

So far the pre- respect of the document purporting to be a confession of the accused. *San Bai v Crown*, 1 L B R 310 (F. B.), see also Magistrate during the course red by s 164, cannot be made. *Emperor v Radhe*,

7 C. W. N. 9

the section

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A Magistrate

whether a confession

Section 80 of the Evidence Act, expressly provides for proof of the document, distinguishing it from a record of evidence as well as s. 533 Criminal Procedure Code. *Lalu v Empress*, 2 P. R. 1894 Cr. S.

Dying declarations. A dying declaration is not admissible in evidence without proof that the deceased actually made the declaration. Even if it bears a Magistrate's attestation it is not admissible under s. 80 where the Magistrate was not the committing Magistrate. The person who took the statement should be subject to cross-examination as to the dying man's state of mind when he made it, and as to other circumstances. *Reg v. Fata Aduji*, 11 B H C 247, see also *Hasim v. Empress*, 9 P R 1900 Cr. = P L R 1900 p. 49. When a dying declaration has appended to it a deponent and declared to be recorded the statement, s. 80 of circumstances under which it is stated to have been taken are true, the investigation by the Magistrate being a judicial proceeding. *In re Karrupan Samban*, 16 Cr. L. J. 759 = 31 Ind Cas 359.

Previous admission. Before a previous admission can be used against a party it must be put to him and an opportunity afforded to him to explain it if it is capable of explanation. *Maryam v Nagina*, 12 Lah L J 161.

81. The Court shall presume the genuineness of every

document purporting to be the London Gazette or the Gazette of India, or the Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be

Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents

a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

Principle. The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led to

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superintend
the printing. The object of this provision was to furnish the people with authentic copies; and from their nature, printed copies of this kind, either of public, or private laws, are as much to be depended on as the exemplification verified by an officer who is the keeper of the record. I am for admitting the printed copies authorized by the Legislature, either of this or any other state, whether the law be public or private. But the question whether the copy of a Government Gazette or any other publication can be treated as evidence of the contents of the original is not one relating to proof of documents but to the

81. admissibility of the secondary evidence *Jeremiah v. Vas*, 36 M 457-12 Ind Cas 961.

Gazette
authoritative in
the same case *But*
is admissible to
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burn, 5 Esp 234; *Att-Gen v. Macanstone*,
493, *R v McCarthey*, (1903) 2 Ir R 146
nce Act, 1868, s. 2 amended by the Docu

mentary Evidence Act, 1882, s 2, the Gazette
any proclamation, order, or regulation issued by
or any principal department of State See also *L. . .*
Ex parte French, 52 L J Ch 48; *Ex parte Learoyd*, 10 Ch D 3; *Ex parte Giesse*,
22 Ch D 436; *Boaler v Power*, (1910) 2 K B 229 C. A *Van Omeron v*
Dowick, 2 Camp 44, Stat 31 & 32 Vict C 37, ss 2, 5 But the entire gazette
must be produced *Rex v Loue*, 15 Cox 286. Under the provisions of this
must be presumed, though it is not
up v Emperor, 7 Lah L J 264-88
1078-A T R 1925 Lah 299, in

Gazette print

v Emperor, A 1 R 1931 Lah 273-32 Cr L J 1441.

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15 M & W. 319, 336, A
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Registration of Books Act

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"It is contended that under section 81 of the Evidence Act, the Court is bound

include a presumption

document purport-

to public documents, but it is very doubtful whether the language of the section supports it. It the punctuation may be taken to throw any light on the word 'journal' is against the

'newspaper or journal'

question further, as I am of opinion that the presumption of the genuineness of a newspaper does not incl.

published by the person by w

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Gathercole v. Miall, 15 M & W 319. *Parke B* was of opinion that as the defend-

ant had been proved by

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defendant. According to section 7 of Act XXV of 1867, the production of an

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statement. *Beva Sarup v. Emperor*, 88 Ind Cas 22=7 Lah L J 261=26

P L R 566=26 Cr L J 1078, but see *Ram Chandra v. Emperor*, A I 1930

Lah 371=31 Cr L J 168

82 When any document is produced before any Court,

purporting to be a document which by the

Presumption as to

document admissible

in England without

proof of seal or sig

nature

law in force for the time being in England

and Ireland, would be admissible in proof of

any particular in any Court of Justice in

England or Ireland, without proof of the seal

or stamp or signature authenticating it, or of the judicial or

official character claimed by the person by whom it purports to be

signed, the Court shall presume that such seal, stamp or signature,

2. is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland

Origin of this section. This section consolidates ss 9, 10, 11 of Stat 14 & 15, c. 100, which provided that a document produced in any Court of Justice in England or Wales or before any person having authority to receive evidence, without proof of its authenticity, or of the judicial character of the person producing it, shall be admissible for the same purpose for which it would be admissible in England or Ireland.

extent and for the same purposes in any Court any person having in Ireland by law and receive and examine evidence, without proof of authenticating the same, or of the judicial character of the person producing it.

Section 10 runs as follows "Every

shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in England or Wales or before any person having in

in any Court of Justice of any of the British Colonies, or before any person having in any such colonies, by law or by consent of parties authority to hear, receive, and examine evidence, without proof of authenticating the same,

Ibid) So British Colony included British India. But section 11 of Lord Brougham's Act was repealed in India by the Indian Evidence Act section 2 and schedule and from the Statute Book by Statute Law Revision Act of 1874. The Indian Evidence Act has repealed section 11 above but has given effect to the object of that section by enacting this section.

Scope of the English law. There are many instances where records are kept by persons occupying public office, or engaged in occupations of a public nature. These records, though somewhat similar in kind to those of which the Court may take judicial notice, do not usually have a sufficient degree of publicity to bring them within the limits of that class of matters. They are, however, deemed

admissible if a person having authority to receive evidence readily discloses them. Usually the person keeping the record is under some obligation, official or otherwise to keep them, and this brings them close to those entries in account books which are admitted because made in the regular course of business, pursuant to duty. The application of this exception to the hearsay rule in the early cases caused the admission of acknowledgment of deeds made before a Court of record, enrolments of deeds, fines and recoveries, and many records of similar nature. *Snart v Williams* 1 Salk. 280. *Lynch v Clerk*, 3 Salk. 151. It is necessary conditions to the

admissibility of a public record or document that it shall have been intended to S.

this exception. He says at page 214: "What a public document is within that rule, is of course, the great point which we have now to consider.... I do not think that 'public' is to be taken there as meaning the whole world. I think an entry in the books of a manor is public, in the sense that it is an entry in a public book, and that all the persons who have access to it must be able to see it. I think that it should be made for the purpose of being examined by any person who may have access to it afterwards."

It is not even by the Common Law of England that a copy taken on behalf of the party, generally by some clerk or other private persons, who produces it in the witness box and proves that he has copied it accurately from, or examined it

parties authority to hear, receive and examine evidence, provided it be proved to

and burials which have been kept in pursuance of canon and statute law answer his description, [*Re Hall's Estate* (1852) 22 L. J. Ch. 177; *Re Porter's Trusts*, (1856) 25 L. J. Ch. 698]; but it seems doubtful whether it could be held to

beneficial effect of the enactments was much diminished. In order to remove that—
... any certain joint stock

or other. of any document, by law, entry in
 any reg. proceeding, shall be receivable in
 evidence of any pr local tribunal
 or either house of
 judicial proceeding,
 they respectively
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 without any proof
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. n appearing to have signed the same, and
 every case in which the original record
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L. R. 2 C C 85 The re
 poll books were provable und
 75 The bye-laws of a rail
 B & 9 Vict. C 20, = 108-111,
 the secretary of the company in whose custody they are *Monera*
 Counties, 7 C B N S 53-29 L J M C 57 As to proof of bye-laws
 of a municipal corporation under Stat 45 & 46 Vict C 50, s 24, vide
Robinson v Gregory, (1905) 1 K B 531 For a complete list of Statutes
 which contain provision making certified copies evidence, vide *Roscoe's*
Digest of the Law of Evidence, Eighteenth Ed Vol. I pp 93 100 For an
 exhaustive list of documents which are provable in England by means of
 certified copies under particular Acts of Parliament Vide §§ 1602-1609 of
Taylor on the Law of Evidence, Wills on Evidence, 2nd Ed Appendix A
 pp. 422-465.

Scope of the Section The object of this section is to give currency in
 the Courts of India to the presumptions which, with regard to certain classes
 of documents, are recognised in the English Courts Such documents are
 declared by the section to be admissible in India as they would be in England,
 and it is no more necessary in Indian Court, than it would be in an English
 Court to prove the seal or signature or to prove that the person signing held
 the office which he claims *Cun Ev* 11th Ed 175 The chief magistrate of
 the city of Glasgow being a person lawfully authorized to administer oaths,
 a declaration as to the execution of a power of attorney taken before him and
 authenticated by his certificate and the common seal of the city of Glasgow
 and by a Notarial certificate is sufficient proof of the execution In the goods
 of *Hend* the declarations must not to have been made
 under Will IV C
 62; see 367; In the
 goods In the goods
 of *Hend* s of *William*
Cornell *nina Lindo*,
Ind a deceased,
 n appointed

application must be refused In the goods of
 delivering the judgment *Novis J* said Section 85 of the Evidence Act pro-
 vides that the Court shall presume that every document purporting to be a
 power of attorney, and to have been executed before and authenticated by a
 Notary Public or any Court, or Judge, Magistrate, British Consul or Vice-
 consul, or Representative of Her Majesty or of the Government of India,
 was so executed and authenticated. This power of attorney is not executed

before or authenticated by any of the persons mentioned in the section, and in order to comply with the provisions of the section, the power of attorney of those persons. Therefore It is submitted that Norris e Section 85 of the Evidence acilities to prove powers of than that allowed by that

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section
Court

to have been executed in

been held in Calcutta that, in as much as the execution is not proved in the manner indicated in section 85 of the Evidence Act, the application for letters of administration ought to be refused (*In the goods of A J Primrose*, 16 C 716). In arriving at this decision, Mr Justice Norris seems to have assumed that the provisions contained in section 85 is of an exhaustive character and no other mode of proving the execution of a power of attorney is admissible. That assumption however, is, in my opinion, not

not to apply to affidavits
prescribed by the statute of
oath I am of opinion that
I am told
to receive
But certi-

T 385-24 M L J 517-19 Ind Cas 452 and section 35(5)
N 35-13 M L

83 The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate, but maps or plans made for the purposes of any cause must be proved to be accurate.

Principle The general ground of reception is that such documents contain the results of inquiries made under competent public authority and concerning matters in which the public are interested. *Phipson*, 313. The very office of a surveyor is to run lines and establish boundaries for the purpose of applying the terms of grants and patents and thus of perpetuating the settlement of boundaries. It is therefore a natural authority to make a written maps are admissible in evidence.

does not of itself prove any title, but only that the person fills the office.

3. *Per Patteson J in Bouley v. Barnes*, 8 Q. B. 1037. The well-known maxim of *omnia presumuntur rite esse acta* applies

Scope of the section :
 purporting to be prepared
 9 M L T. 415 This section
 of a private map. If such a map
 depend upon the relevancy of the map in relation to the question in controversy
Shib Charan v. Nil Kantha Maharo, 16 Ind. Cas. 747 = 17 C. L. J. 612. In the
 absence of evidence to the may be
 properly judicially received in *Gyan*
v. Ma Nque, 2 L. M. R. 56 A in the
 the silted bed of a
 83; but it is a
 before it can be
 13 C. 385 In a
 valuable evidence

which should be considered
Ranee v. Gireedharce, 20 W.
 ment, while in charge of
 only that of a private prop-
 a presumption of the acci-
 574; *Ram v. Bansidhar*, 9
 making a *thakbust* map, as
 what lands were *debutter*, but only to lay down and to map boundaries, held that
 this map could not be treated as raising a presumption of correctness within
 this section, on the question as to the amount of *debutter* land in one of the
 villages mapped. Where statements as to what lands were *debutter* appeared
 on the face of the map to have been made as pointed out by agent on behalf of
 the proprietor of the *manor* and the principal tenants, in the presence of the
 agent of the holders of
 section has not the
v. Lalor Mont, 18 C. 2
 accuracy of drawings and measurement it has no relevance W. R. 179

must be presumed to be accurate under this section. *Kahimarusum v.*
of State, 113 P. L. R. 1913 = 113 P. W. R. 1913 = 18 Ind. Cas.
 799 No presumption of accuracy can
 within this section *Madhabai v. Gagan*
 section a *thakbust* map must be presumed
 22 W. R. 519, see also *Photal v. Ranee*, 13 W. R. 501 & C.
 Government survey map having been prepared does not affect the presumption
 of accuracy, under this Act of an earlier superseded map. *Joggesur Singh v.*
Bycunt Nath, 5 C. 823 = 6 C. L. J. 510 A copy of a map prepared by an *Amia*
 employed by Government,
 for possession. It was adm-
 ultimately rejected by him,
 was made by the High C

as correct when made *Gopal Lal v. Mariamunnessa*, 84 Ind. Cas. 433 = 11
 1924 Pat. 719 The signature of a revenue-surveyor on a *thakbust* map signifies,

not that the thakbust map is correct, but that the demarcation boundaries laid down in the course of this bust survey have been correctly picked up on the survey map. *Sashubhusan v. Ind Cts* 205. There is no preference over a Thak map, agree, where they differ, the one that more nearly agrees with the land mark is the one which should be incumbent upon the day, if it considers the survey map. *Maharaja of Cooch Behar v. Raja Mohen Ira Ranjan*, 66 Ind Cas 923; see also *Abul Hossain v. Doucun*, 11 C W N 629, *Burn v. Ichambit*, 20 W R 14, *Nanah v. Gopinath*, 13 C L J 625 (632), *Amrita v. Sheraulin*, 19 C W N 565 (576). But where the Thak proceedings and the decision of a dispute took place in the presence of the predecessors of the parties to a suit, that map must be treated as valuable evidence in this suit between the successors of the persons who were present. *Maharaja of Cooch Behar v. Raja Mohen Ira Ranjan*, 66 Ind Cas 923; see also *Suraj Kanta v. Sarat Chandra*, 15 C W N 1281 P C, *Dunne v. Dhavan*, a *Sutani* 2 W R 210; *Gungu v. W R* 179, *Nobo v. Gobind*, 9 C L : *Ind v. Kuan*, 7 C W N 819.

The state of things at the time the map was made is the state of things at the time of permanent settlement. *Secretary of State v. Hazrat Ali* (5 Ind Cas 667, *Jagadindia v. Secretary of State*, 7 C W N 193 P C, see also 20 C W N 1028; 35 Ind Cts 132. Presumption both as to physical features and to statements as to possession may be made from the map. 64 Ind. Cas 326.

The question whether a map is a public document within s. 74, Evidence Act, in the state, in a

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the Government, acting not in its sovereign capacity, but as the land lord of certain holding is admissible in evidence, if not under this section, under section 13 of the Act. *Upendra v. Chairman of the Calcutta Corporation*, 16 C W N 116.

received in evidence as correct when made. *Jagadindia Nath v. Secretary of State*, 30 C 291=7 C W N 193=5 Bom L R 1; see also *Satcourt v. Secretary of State*, 22 C 252, *Maung Thin v. Maizan*, 44 Ind Cas 247, *Syama Sundar*, 784; *U v. V.*

s. 13 when it is not known whether they were acted on for the purpose of registration proceeding or if in fact reliance was placed upon them by

&
5.

the purpose of
Ind. Cis. 85=A
without enquiry
be placed on it
C L. J. 319
ment on which
evidence, there

such matters as to which it is admissible in evidence *Secretary of State for India v. Ananda Mohan*, 31 C L J 205; see also *Narash Narayan v Secretary of State*, 71 Ind Cas 1048=32 M L T 162=50 C 446=45 M L J 444=23 C W N. 453 P. C. *Haridas Acharyya v Secretary of State*, 43 Ind. Cas 361=26 C L J 590=23 M L T 433=20 Bom L R 49 (P. C.), *Secretary of State, v Kalika*, 15 C L J. 281.

84. The Court shall presume the genuineness of every book

Presumption as to collections of laws purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

Principles
ness of print
to a general
publications
stantly issued
however, are
to be printed

original, and secondly, the presumption of genuineness of a particular printed document purporting to be of such official origin. The two questions are seldom separated, either in decisions or in statute; a sanction of the former principle has usually been regarded as carrying with it a sanction of the latter also" *Wigmore* § 2151

Sense of the section. The words "any country" are wide enough, to

na section 33 reports of cases recognized by the Courts of a country will be evidence; and be relevant and receivable *Nori Ev* 202; see also notes under section 39.

85. The Court shall presume that every document

Presumption as to powers-of-attorney, purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the Government of India, was so executed and authenticated.

Principle. The genuineness of certain purporting official seal impressions need not be evidence otherwise than by the production for inspection of the document bearing them. What is the significance of this rule? What is it that Courts actually do, evidentially, when they accept such seals with no further evidence? When a document bearing a purporting official seal—a notary's

certificate to a power of attorney, for example—is offered in Court the accept-

document purports to be
 result of the first three
 ury, did make this written
 and the document was
 merge (i.e. the purpor-

ing J S
 seal that
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 always judicially united, i.e. any presumption of genuineness, whenever made
 covers both elements. Hence, in effect, the situation, for seal or signature alike,
 is reducible to the following elements and is so in practice treated (1) that
 there is an official of that name (2) (3) that this document was genuinely
 executed by him. Now the remaining element (4) that this hearsay statement
 of his is admissible, is obviously concerned with the Hearsay rule.

Of these, the elements (2) and (3) are obviously pure questions of authentication,
 i.e. the acceptance of the document signifies that we have somehow
 assumed that this document was genuinely executed by one J S. What is the
 true nature of the process? Is it the process of Judicial Notice? It is some-

soon as the party alleged by counsel that J S had executed an alleged docu-
 ment, the Court must notice that as a fact, and no production of a purporting
 seal or signature would be necessary; but this is obviously not the practice.
 Further more it is conceivable that a Court might judicially know what the design
 of a certain public seal was but this would not of itself enable the Judge to
 declare that the specific impression offered in Court was genuine or forged. It
 would seem, then, that what is actually done is not done by virtue of any doctrine
 of jud

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 The
 of an
 this may well serve as sufficient evidence because the forgery of the seal or
 signature would be a crime, and detection would be fairly easy and certain.
 On the other hand the element (1) noted above, namely that J S who has thus
 genuinely executed this document is the official that he purports to be, is a real
 result of the principle of Judicial Notice. This element is wholly separable
 from that of the authenticity of the paper. *Wigmore* § 2161

and authentication of a power-of-attorney when such execution was done before
 and authentication was done by any of the officials mentioned in this section.
 The section is an extension of the provisions contained in the Registration Act,
 with reference to powers-of-attorney executed for the purpose of procuring the
 registration of conveyance or other such instruments. *Cun Ev 11th Ed* 178
 Where a power-of-attorney was neither executed before nor authenticated by
 any persons mentioned in this section, letters of administration to the estate of
 a deceased
 the goods of
 execution is
 not exhausti
 16 C 776

5. been executed before, and authenticated by, a Notary Public, is produced before the Court, an affidavit of identification as to the person, purporting to make the goods is admissible for, the III, rule Ind. Cas England ed by his signature alone without ids of *Bridoon*, Nov 19th 1899, per

ie term "power of attorney" is given the *Indian Stamp Act*, "power of-attorney" includes any instrument (not chargeable with a fee under the law relating to Court fees for the time being in force) empowering a specified person to act for and in the name of the person executing it. So a power or letter of attorney in a in such case is called the attorney of a t, in the stead of another; as to person; transfer stock or give possession upon a deed of feoffment. It is either general or special, i e, general in respect of the conduct of all affairs of a person, as where he leaves the country; special in respect of any one or more named matters, as to receive money. This instrument gives the attorney authority to act in his name exactly as the party giving it would himself do until revocation. *Bank of Bengal v Ramanatham*, 43 C 527, *Venkataramana v Narasinha*, 38 M 134-24 M L J 180-1913 M W N 72-18 Ind Cas 187; *Permanand v Sat Prasad*, 33 A 487-19 Ind Cas 617 (F B), *Reference under the Stamp Act*, s 46, 15 M 386, *Righu v Ramchunder*, 10 W. R 39-11 B L R 65 (F. B.), *Jogi v Mohammad*, 60 Ind Cas 467, *Biyant v Banque du Peuple*,

the power of attorney was a proper power under s 33 of the Registration Act. Section 34 of the Registration Act imposes upon the registering officer the duty of enquiring as to the due execution of the document, and by s. 35, he registers the document on being satisfied as to the various particulars mentioned, so that when the

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v. *The National*

v. *Jamal*, 28

375-27 C W N 437 P C; *Kristonath v Brown* 14 C 170; *Jambu v Muhammad*, 42 I A. 22-37 A 49-19 C W N 282. As regards deposit of original instruments creating powers of attorney, vide section 4 of the Powers of Attorney Act (VII of 1892). Powers of attorney should be strictly construed. *Krishna v Pribhuban*, 114 Ind Cas 305-A I R 1929 Oudh 12, *Bank of Bengal v. Ramanathan*, 43 C 527-43 I A. 49

Notary Public In the interests of commerce the rules of evidence have been so extended that the acts of notaries public in the discharge of their duties under the law merchant are judicially noticed in all Courts, and their proper official acts under the law merchant are *prima facie* sufficiently authenticated

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Ineff, 24 L J Ch 120, under s 133 of the Negotiable Instruments Act (XXVI of 1891) the Governor General in Council is authorized to appoint notaries public within any local area and by s 139 of the same Act power is given to the same authority to make rules for notaries public

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India * [in or for] such country, to be the manner, commonly in use in that country for the certification of copies of judicial records

† [An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefore, as defined in section 3, clause (40), of the General Clauses Act, 1897,‡ shall for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.

Principle The theory of judicial records is that the judgment roll, as finally made up embodies in itself alone the entirety of the controversy adjudicated, and thus supercedes the miscellaneous mass of oral and written pleadings, motions, and orders, which have gone to make up the proceedings *Wigmore* § 2450 The doctrine about producing the original of a document, or when the original is not of the original judicial

under the Great Seal of a State in as much as proof than inspection, the seals of state of other nations which have been recognized by their own sovereign *Greenleaf Ev* 479) they may be authenticated by a copy, proved to be a true copy by a witness who has compared it with the original, properly authorized by law to give a copy, duly authenticated *Buttrick v Allen*, 8 Cranch 228, *Church v Hubbard*, 152 subject is thus stated by *Marshall C.* The sanction of an oath is required for their establishment unless they can be verified by some other

So this section authorises the representatives of his Majesty or the Government

* These words in s 86 were substituted for the words "resident in," by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s. 2

† This paragraph was added to s 86 by s 4 of the Indian Evidence Act, 1899 (6 of 1899), in substitution for the paragraph added by s 2 of the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891)

‡ X of 1897.

the Evidence Act, when there was a representative of the Government of India resident in Coah Behar. The notification referred to above is of no use when sent out of India in Coah Behar, so that Coah Behar cannot then be received in 86 of the Evidence Act

87 The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published

Presumption as to books, maps and charts

Scope of the section . In proving matters of public or general interest the declarations will not be confined to those which are merely oral Thus in England ancient maps showing public roads and the boundaries between counties, towns, parishes and manors are admissible, when it is proved that they have been made or recognized by persons having knowledge of the subject who are since deceased *Hammond v Braintree* 10 Ex 390 *Pipe v Fitcher* 28 L J Q B 12, *Reg v Milton* 1 C & K 53 But this section authorises a Court to presume that book on matters of public or general interest and any published map or chart, was written or published by the person and at the time and place, by whom or at which it purports to have been written or published A Court in

28 C L J 306-48

legitimately be made to the work of Mr Crokes on Castes and Tribes on the North Western Provinces and Oudh is an authoritative custom prevalent among the Urdu sect of Mahomedans Great weight attaches to the accuracy of survey maps but they are not conclusive In the absence of evidence to the contrary, however they should be presumed to be accurate *Secretary of State v Radha Kishore*, 38 Ind Cis 379 P C -21 C W N 291-44 C 328

88 The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent, but the Court shall not make any presumption as to the person by whom such message was delivered for transmission

Presumption as to telegraphic messages

Scope of the section To prove a telegram sent by the accused the writing handed to the telegraph office not the copy received is the original *R v Regan* 16 Cox Cr 203, *Hinkel v Pape* L R 6 Ex 7, *Godwin v Francis*, L R 5 C P 295 Whether in proving the terms of a telegram the despatch sent or the despatch delivered and received is the one to be accounted or depends upon the substantive law involved *Wigmore* § 1230 In *Duiles v Ro, Co*, 29 Vt 127, 140 (a Vermont Case) *Redfield C J* said 'It depends upon which party is responsible for the transmission across the line, or in other words whose agent the telegraph is' Where the received despatch is the legally material document, it must be accounted for, a recorded copy of it would ordinarily be preferable to mere recollection, and the message as handed in by the sender perhaps might also serve as a copy, but where the party to whom the communication is made is to take the risk of transmission the message delivered to the operator is the original' *Wigmore* § 1236 This section allows the

9. Courts to treat telegraph messages received as if they were the originals sent,

addressed. In the absence of such evidence, the telegram cannot be held to have been proved. *Thakur Singh v Emperor*, 4 Ind. Cas 240. The Court is forbidden by the express provisions of this section to make any presumption as

telegram to ask the Court to presume that it was sent by a supposed sender. But there is nothing in the section to prevent the telegram once admitted from being considered along with the rest of the evidence. *Emperor v Abdul Gani*, 49 B 878=27 Bom L R 1373=91 Ind Cas 690=A I R 1926 Bom 71

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

Presumption as to due execution, etc., of documents not produced.

Principle A circumstance sometimes treated as an extrajudicial admis-

the paper) Everything is to be presumed in *odium spoliatoris*; and had it certainly appeared that the destroyed paper purported to be an agreement such as was attempted to be established, it would have sufficed for the admission of

it would be not only innocent but prudent to destroy. If the paper destroyed were shown to have been an agreement for the land, it would raise a presumption of identity, sufficient to dispense with the ordinary proof of execution, and let in the contents of the paper (as proved by another witness). (But the witness

identity and consequent execution." *Wigmore* § 2132. So this section proceeds on the maxim, *omnia presumuntur contra spoliatorem* (Every presumption is made against a wrong doer)

Scope of the section. There is a presumption also in favour of innocence, the law presumed, produce *Vort Es* nature of his case would be manifested, every presumption to his disadvantage will be

adopted" I Smith L C 10th Ed 353; 1 Vern 19. According to the same principle, if a man withhold an agreement under which he is chargeable, after a notice to produce, it is presumed as against him, to have been properly stamped. *Anderson*, 1 Stark N P C 35, *Marine*, 625. This section is restricted to cases, where a summons to produce is delivered to a stranger to the suit. *Mar. Ev* p. 68. See also *Ahmad Raza v Sayyad* *Ibid*, 38 A 494-21 C W. N 265. So where any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped, (*Closmadence v. Carrel*, 18 C B 44), unless it be shown to have remained unstamped for some

party. It does not extend to cases, where a summons to produce is delivered to a stranger to the suit. *Mar. Ev* p. 68. See also *Ahmad Raza v Sayyad* *Ibid*, 38 A 494-21 C W. N 265. So where any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped, (*Closmadence v. Carrel*, 18 C B 44), unless it be shown to have remained unstamped for some

case (a) they are presumed to have been made after the execution of the Will. *Simons v Rudall*, 1 Sim N S 136. In case (b) they are presumed to have been so made that the making would not be an offence. *Gordon's Case*, Deak Sl & P 592 per *Jervis C J*, *Stol's Anglo Indian Code*, Vol II § 909. Where the

gages and where the mortgagor failed to produce the deed before the Court though called upon to do so. *Held* that the execution of the mortgage deed was in view of s 89 of the Evidence Act satisfactorily established, irrespective of the provision of s 68. *Jang Bahadur v Chandraj Singh*, 41 Ind Cas 171.

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81

Illustrations.

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his title to it. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagor. The mortgagor is in possession. The custody is proper.

(c) A, in connection with B, produces deeds relating to lands in B's possession which were deposited with him by B for safe custody. The custody is proper.

Principle. The First, after a long saw the document's ex

90. exists for resorting to circumstantial evidence Secondly, the circumstance of

been found amongst deeds and evidences of land may be given in evidence, although the execution of them can not be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption that they were fairly and honestly obtained and reserved for use, and are free from suspicion of dishonesty' *Wigmore* § 2137; *Wymne v. Tyrnhill*, 4 B & Ad 376; *Andrews v Motley*, 32 L J C P 128, 131. So as a rule of procedure, the witnesses in proving procedure or practice of convenience may

to writings thirty years old are conclusively presumed to be dead,—so that execution of such a deed, will or other document need not be proved *Chamberlayne's Li* § 1165 As the question is one of procedure and not of logic, this presumption is not allowed to be rebutted by proof that such witnesses are alive and actually in Court *Doe v Hooley*, 8 B & C 22, *Doe v Burdett*, 1 A. & E 19, *Marsh v Collnett*, 3 C-p. 655; *Phip Ev 7th Ed* p 504

the case may be, by persons, in the manner, &c.

state or otherwise identify the means or characters of the parties to it, some sort of evidence will be necessary before it will be admissible *Wills Ev, 2nd Ed* 381

The rule is

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purporting to be ancient is not likely to escape exposure, when subjected to the

13 The in-

documents

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rule and to admit, under proper restrictions, ancient documents purporting to

constitute part of a transfer of title or

11 Apv Cas 603 "The proof of

difficulty Time has removed the with

nection with many different kinds of documents *Doe v Samples*, 8 A. & E 151), *Wills*, bonds (*Chelms v Couper*, 1 Esp 275) memo- 28 L R 141), leases (*Plaxton v Dora*, 10 *Thornbury*, 29 L J M. C. 109), cases stated

for counsel's opinion (*Meath v*
containing entries of the receipt

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years old, they need not be proved, provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were

title which such documents profess to create *Luteffunmissa v Goor Sarun*, 18 W R 485 The rule regarding the proof of documents more than thirty years old is that they need not be proved provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty *Hari Dhagonr v Biru Dasee*, 5 B H A C 135 In order to establish the authenticity of an ancient document it is not necessary to show that it was accompanied by possession *Bisheshur Bhattacharya v George Henry Lamb*,

than 30 years old and that it was produced from proper custody, yet before ce, it must be shown that it is Evidence Act *Mathura Pershad*

thirty years old and is produced from proper custody, the Court may under this section presume its genuineness and more particularly that of the signature appearing on it *Bhupali Singh v Khetal Singh* 41 Ind Cas 274, *Nur Muhammad v Allah Wasai*, 5 P W R 1915-35 P L R 1915-27 Ind Cas 562, *Gulab v Mahomad*, 35 Ind Cas 593, *Duarka v Mala*, 49 Ind Cas 419 The Will in dispute having been duly registered and the document being over thirty years old, it must under this section, be presumed that it was a genuine document, and the fact that it was registered raised the presumption that the testator was of sound mind at the time of the execution of the Will *Babu Badri Prasad v Anupurna Kuer*, 6 O L J 311-52 Ind Cas 837 A Will of 1873

the attesting witnesses except one were dead and the surviving attesting witness

of the law may not have been given to the purchaser, there is no reason why the Court should presume that no possession was given *Pandurang v Basappa*,

0. A. I. R. 1923 Bom 364.

rently from proper custody
show that it was not acted

nature to be acted upon, the presumption as to the title created by such document falls down *Mahadeo v Ragotrai*, 1923 Bom 293 In the case of a document more than 30 years old executed by an illiterate person but registered, there is from this two circumstances a presumption of its being genuine *Bhim Sankar v Mani Ram*, 9 O & A L R 893 A deed more than 30 years old and executed before the Transfer of Property Act, even if not signed by the executant but only by some scribe at his instance will be presumed to be genuine *Gaya Singh v Surnybal*, A I R 1924 All 832 If one is dealing with a document some thirty years old the main fact that the proof of consideration is not at all satisfactory, is by itself a slender ground for holding that the document known to have come into existence was entirely unreal *Sailaya Nath v Raja Resheecase* 51 C 135=39 C L J 340=81 Ind Cas 493 The document was more than 30 years old and was produced from proper custody and all the witnesses were dead *Held* that the presumption must be made under s 90 of the Evidence Act that the attestation

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proof establish that the

10 *Purna Chandra v.*

Radhakamohan, 90 Ind Cas 722 Where all the executants are dead, the scribe is dead the persons who purport to have been the attesting witnesses are dead,

receipt of consi-

10 is also dead,

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a document was

executed by the person who purported to be the executant, but the Court cannot presume the correctness or genuineness of every statement appearing in the document *Kshetra Mohan v Bhuvanab Chandra*, 98 Ind Cas 1021=A. I R 1927 Cal 229; *Abdul Gham v Fuqir Mahomed*, 111 Ind Cas 361 Genuineness of *jama uasil baki* papers more than seventy years old, can be presumed under this section *Nirod Krishna v Prodyat Coomar*, 45 C L J 129 The presumption of execution of the document extends to the marks man *Shailendra v Giriya*, 58 C 686=A I R 1931 Cal 896 This section does not contain any restrictions that a presumption should not be drawn thereunder if the person claiming under the document in question is out of possession or has not actually signed or thumb marked the document itself *Iman v Natha*, A I R 1932 Lah 43=32 P L R 626.

Purporting Section 90 of the Evidence Act, does not enable a Court to presume that unsigned accounts, which do not purport to be in the handwriting of

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would be excluded were it not for this section, which contains an excellent provision, if it is not misunderstood *Mark Ey* p 63

Thirty years--Mode of reckoning Since the chief reason for the rule is the impossibility of obtaining living testimony to the signing or to the hand-

writing, the necessity does not arise until time has made such testimony unavailable. At first under the English Common law, this requirement was satisfied by the simple and indefinite notion that the deed must be ancient. In some of the old books the average age of a man was computed to be sixty years, that an
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Olive, Bunbury 280, Clarkson & Woodhouse, 3 Doug 169 But this reckoning was too strict, because the witness were more persons and therefore at least thirty years of age, suffice to bring them near the end of the span
 1700 B, the period of thirty years has sufficed to constitute an ancient document.
l v Baker, 1 Atk 21, 49, R. 252, Chelsea Water Works v Wignmore § 2138 The period

have forged the written date years ago must be somehow shown *Forbes v Hale, 1 W. Bl 532* In the above named case Lord Mansfield said; 'If the length of the date is alone sufficient to establish it a man has nothing to do but to forge a bond with a very ancient date' *Wignmore § 2138* But it seems that this section does not require any such extra evidence. Hence in the case of a Will the period of thirty years is reckoned not from the testator's death, but from the date of execution of the instrument *Doe v Wolley, 11 B & C 22* In applying the presumption allowed by s 90 of the Evidence Act, the period of thirty years is to be reckoned not from the date upon which the document is filed in Court, but from the date, or otherwise become
 R 135 But in an years old when it was produced, there is no presumption as to its genuineness

thirty years old on the date when arguments were heard *Mahadeo v Nasiban, 54 Ind Cas 368* The period of thirty years mentioned in this section is to be reckoned from the date when
 283-75 Ind C

Thirty years should be counted from the date of its genuineness being subjected to proof *Konda Reddi v Pichu Reddi, A I R 1925 Mad 184*

Proper custody The mere production of an ancient document by a party affords no proof of proper custody and it is for the party producing it to explain how the document came to be in his custody *Trimbak Das v Mattabar, 27 N L R. 75-124 Ind Cas 609-A I R 1930 Nag 225, Ramnaresh v Chukut, A I R 1932 Oudh 227-9 O W N 319* The Court added that it was only necessary to show the age of over thirty years, and that they came from a natural and reasonable cause found
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 the cause

or any other custody which in the circumstances of the case appear to the Court to be consistent with its genuineness *Doe v Phillips, 8 Q B 158, Doe v. Keeling, 11 Q B 884, Wills Ev 2nd Ed 385* In *Meath v Winchester, 21 Being. N C 183, 200, Tindal C J* said: "It is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity. But it is when documents are found in other than the proper place of deposit that the investigation commences whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found. For it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable though differing in degree, some

90. A. I. R. 1923 Bom. 364. . . .
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 a than 30 years old and executed
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v Sumbali, A. I. R. 1924 All 832 If one is dealing with a document some
 thirty years old the main
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dead Held that the pre-umption must be made under s 90 of the Evidence Act
 that the attestation was duly made *Mahomed Hasan v Ali Hinder*, 12 O L J
 1-85 Ind Cas 509 A partition chitta purporting to be more than 30 years
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 was no proof that it
 collectorate custody was proper custody within section 90 *Purna Chandra v.*
Radhiamohan, 90 Ind Cas 722 Where all the executants are dead, the scribe
 is dead, the persons who purport to have been the attesting witnesses are dead,
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executed by the person who purported to be the executant, but the Court cannot
 presume the correctness or genuineness of every statement appearing in the
 document *Kshetra Mohan v Bhanab Chandra*, 98 Ind Cas 1021-A. I. R.
 1927 Cal 229; *Abul Gham v Faguir Mahomed*, 111 Ind Cas 361 Genuineness
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 tion of execution of the document extends to the marks man *Shailendra v*
Gurja, 58 C 686-A. I. R. 1931 Cal 896 This section does not contain any
 restrictions that a presumption should not be drawn thereunder if the person
 claiming under the document in question is out of possession or has not actually
 signed or thumb marked the document itself *Iman v Natha*, A. I. R. 1932
 Lah 43-32 P L R 626

Purporting Section 90 of the Evidence Act, does not enable a Court to
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which are excluded were it not for this section, which contains an excellent
 provision, if it is not misunderstood *Mark Ey* 68

Thirty years—Mode of reckoning Since the chief reason for the rule is
 the impossibility of obtaining living testimony to the signing or to the hand-

Horner, (1913) 2 Ch .

thereof so far as t

which, judging from

tances of the case, it would naturally be expected to reside, then the document ought to be treated as authentic to such extent as to become admissible in evidence between the parties *Chundra Kant v. Brojonath*, 13 W R 109. Whether the custody of a document is a proper one under section 90 of the

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than 30 years

old comes from custody of the mortgagee, the presumption of proper execution readily arises and it is proof of the mortgage *Iamachari v. Sadho Suran*, A. I. R. 1924 All 269. The mere fact of a certain document having been produced from a Court where it had been filed does not necessarily bring that document within the requirements of this section *Rajendra v. Gopal* 4 Pat 66=A I R. 1925 Pat 442

May presume It is in the discretion of a Court whether it will raise the presumption, in favour of a document for which s 90 provides. But this discretion is not to be exercised arbitrarily but must be governed by principles which are consonant with law and justice. And while, on the one hand, great care is requisite in applying the presumption, on the other hand, it is clear that very grave injustice may be perpetrated, if an ancient document coming from proper custody is rejected by a Court capriciously or for inadequate reasons *Gorinda Hazara v. Protap Naram*, 29 C 740; *Ram v. Chulut*, A I R 1932 Oudh R 227=9 O W. N 379. When a document, which is over thirty years old, has been which is a mentioned

ment, stating its reasons in the latter event and, in the former, whether the presumption has been rebutted or not *Sumath Patra v. Kuloda*, 2 C L J. 592. The effect of the presumption is weakened by circumstances which tended to raise doubts as to its authenticity *Madan Mohan v. Kumar Rameswar*, 7 C. L J 615. The presumption allowed by this section is not a presumption which the Court is bound to make *Honuman v. Ramchuritra*, A W N 1901, 28. As to the presumption which a Court may make under s 90 of the Evidence Act, the power thereby given must be exercised with great discretion in a country where documents are written on such material as *parabick* and palm leaf, and where in Burmese time neither parties nor witnesses were ever in the habit of attaching their signatures, so that the term execution is rather convenient

it be more than thirty years old and purports to come from proper custody and that under the circumstances of the present case the discretion was rightly exercised *Safiq unnessa v. Shaban Ali Khan*, 7 O C 290. The words "may presume" in this section, ought generally to be construed in the more rigorous of the sense allowed by s 4 and in view of danger of a blind acceptance of a document as genuine for all purposes, merely because it purports to be a before the pre- found v *Lakh* previous at the time, and as to whether it has ever been acted on previously to its production in Court *Mehar Amir v. Nur Muhammed*, 110 P. L. R. 1902. So it

90. is not obligatory, under this section, upon a Court to assume that the document produced is genuine merely because it purports to be thirty years old and is produced from proper custody. The Court has a discretion in the matter, but the discretion is not to be exercised in a manner which would be inconsistent with the presumption with regard to the genuineness of a document under this section is one in which the Court has to exercise its discretion and when that discretion has been exercised with due care and the presumption allowed by law has been made an appellate Court should be slow to interfere with such discretion. *Mahomed v. Rahim*, 57 P. W. R. 1918-44 Ind. Cas. 559. The presumption is not to be applied to a deed executed by an illiterate.

in refusing to draw the presumption under s. 133 of the Act nor would such presumption be

in itself sufficient to prove the genuineness of a document but such evidence may

age of the document. *1930 Bom. 39.*

in my opinion, lays down more a rule of expediency than a rule of law."

Unsuspicious appearance. A third requirement is that the document must in appearance be unsuspecting. *Wanmore* 6 P. 140. "On inspection it must

is suspicious, on the face of it, and when the very place of importance has been erased and re-written, presumption under this section does not arise. *Baldeo Misir v. Bharos Kumbhi*, 95 Ind Cas 261-A I 1926 A 537. Where a document more than 30 years old purporting to come from proper custody, is required by the Court before which it is produced to be proved and is left unproved, and there are circumstances, both external and internal, which throw great doubts upon the genuineness of the document the Court can, in the exercise of the discretion vested in it under s 90 of the Evidence Act, decline to admit it to evidence without formal proof and their Lordships of the Privy Council will be always slow to overrule the discretion exercised by a Judge under s 90. *Shafiq-un nissa v Shafan Ali*, 6 Bom. L R. 750.

Old Copies The use of
raises two or three questions
fiance, moreover, of the circumst

but this rule does not enable one to use an unauthorized record. Thus, when the record is unauthorized, some other mode of proving the deed must be resorted to. Keeping these principles in mind, the various situations may be distin-

cular mode of proof has been prescribed by the Act. *Krishnaswami v Ananthachari* 4 Mys L J 264, *Saryu Dey v Ram Hwakh*, 18 Ind Cas 250. This section of the Evidence Act does not make it incompetent for the Court to draw any presumption
a copy of the sa

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id was
94-A
218,

Nanu Nair v Kantan Ashta, 2 L W 509-29 Ind Cas 386. But this section

M W N 454-73 Ind Cas 66

Where the alleged ancient original is lost, and proof of its contents (including the purporting signatures) is offered to be made by one who having seen it before its loss, recollects its contents or took a copy, the difficulty in

any witness and the presumption in section 90 cannot apply, for that only relates to documents which purport or are proved to be thirty years old, and This is not one of such documents, and, section 90 can not apply. One of the agent for admitting Exhibit E in *Ponnani*

Ialeth Porapman v Haroth Sankaran, 12 Ind. Cas 153, but from the brief judgment of the contrary, the copy."

copy is offered, made by a private hand, and the purporting maker being unknown and the copy 2113. The

an alleged official record copy offered, though not. *Ibid.* When a copy of a document is exhibited in a suit and the original document is not produced, though the original purports to be more than thirty years old, the presumption which, under s 90 of the Evidence Act, may be made where a document over thirty years

not to be made *Appathura v. Gopala*, cases in which the document is actually produced in Court, secondary evidence of an ancient document is admissible, without proof of execution of it have been lost

P. R 1910=1

case of a copy

Court to presume that the copy is in the hand-writing of the person in whose

though this section does not refer to stamps,

Evidence Act regarding the same on the production of certified copy.

Bahadur v mentioned in the presumption

Duari anath, *Banuarial v.*

Aiyar, 16 L. *v. Subramania*

N 611=46 L. 2=(1922) M. W.

copy *Scethaya* authenticating,

Bom L R 756=1

this section with

as well as originals

be made in favour

Prosad, 6 O W N 880=A I R 1929 Oudh 483 The Court may presume

the genuineness even of an unregistered document thirty years old from a copy

of such document, if the original is proved to have been duly executed, and

further it is also proved that the original is since lost But such a presumption

can only be made after a careful consideration of all the circumstances of the

and, for the purpose

competent to execute

The words 'duly

according to law

whether she has fully understood the question of execution. The term only an abbreviated form of expression intended to connote the necessity of bringing home the transaction to the executant and of proving that it was fully explained to and understood by the parlanshin lady. *Afsar Bejam v Mahomed*, 5 Luck 326=8 O W N. 55=130 Ind Cas 861=A L R. 1931 Oudh 103

Presumption of genuineness whether presumption of executants authority to sign or grant. Where the executant of a document purports to sign it on behalf of others, the fact that it is more than thirty years old, though it would, under the provisions of section 90 of the Evidence Act, raise a presumption in favour of the genuineness of the document, would not dispense with proof of the authority of the executant to sign it on behalf of others so as to bind them or those claiming under them. *Ubtack Rai v Daltial Rai*, 3 C 557. Where it is not shown that the executant of an ancient document was entitled to grant such a document, mere production of it would be no proof of title. *Uggar Kant v Harro Chunder*, 6 C 209. The provisions of s 90 of the Evidence Act merely establish that the document was executed by the persons whose signatures it purports to bear, but that can not and does not

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only the execution of the deed, but not, in the absence of the power or evidence thereof, the authority of the solicitor to execute it. *Re Airey*, (1897) 1 Ch 164, *Phip Ex 7th Ed* 505

This section does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section. *Kashi Nath v Jagat Kishore*, 20 C W N 643=23 C L J. 583=85 Ind Cas 298. The presumption that arises under s 90 of the Evidence Act only extends to the genuineness of old documents coming from proper custody, it does not further go to the extent of holding that the document was in fact executed by persons possessed of the requisite authority. *Tarakeswar Pal v Sush Chandra*, 27 C W N 964. Although in the case of sale deeds more than 50 years old the presumption of law was that they were executed by the persons who purported to execute them, there was no presumption that the scribe who signed these documents executed them to do it. *Haji Shaikh v Ind Cas 989, Ramam Kant v Bhu* Cas 220

Full Bench case has held that the Act in the case of a document executed by the party by whom it purported to be executed includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorized to sign for him. *Haji v Sulham*, A L J 837=1925 All. 1=47 A 31 (F B), *Balloran v Ut Dular*, 24 A L J 920=97 Ind Cas 292

7 O C 299=31 I A
Cas 773. When the
applicability of the pro
the High Court can
7 In *Parankura Zales*
said. "The presumption

Act as to the genuineness of a document 30 years old, is one of fact and stands

that the District Munsiff had drawn the presumption under this section in

Vaiya Dayan, 108 Ind Cas 412

Ancient document—Corroborative evidence : It is well settled that mere production of an ancient doc evidence of acting under it is not.

be corroborated by evidence by other equivalent or explanatory proof, it is then pre-umed to have constituted part of the actual transfer of property mentioned, because this is the usual ab-sence of proof of possession does udly affects the weight to be attached to a, 12 C L J 14-89 Ind Cas 747-A

I R 1925 Cal 1189

later when even that attesting witness was dead. There was no reasonable explanation about the delay after 1910 in making the application for probate. There was no evidence as to the custody of the Will before 1907, held that the applicant cannot get the benefit of s 90 *Channulal v Mt Puna*, 75 Ind Cas 660-1923 Nag 169. Where circumstances of suspicion surround the genuine character of a document thirty years old, the question of applying to it the present rule is one largely of administration. Should the evidence in the case explain and account for these circumstances to the satisfaction of the presiding judge, he may admit the writing to the benefit of the rule of procedure. *Chamberlayne's Ev* § 1165

Rule should be applied with proper care and caution. The rule laid down in s 90 of the Evidence Act as to proof of execution of documents thirty years old ought to be applied with special care and caution. *Trailokia Nath v*

this must Cas s is a ution Allah

Din, 241 P. L. R., 1913-19 Ind. Cas. 961 Before a Court is justified in making

presumption contained in this section *Gobinda v Pulin Behary*, 31 C W N 215-98 Ind Cas 147-A I R 1927 Cal 103

Explanation This is to provide for cases in which the custody is not, perhaps, that where it might most reasonably be expected, but yet sufficiently reasonable to constitute such custody not improper. Thus in the two first illustrations, (a) and (b), the documents are produced from their natural place of custody; in (c) the documents ordinarily would be with the owner B, but

v The Bishop & the see laxton v

Dave, 10 B & C 17, or of the lessee *Hall v Ball* 3 M & G 242

CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

91 When the terms of a contract, or of a grant, or of any

Evidence of terms of contracts grants and other dispositions of property reduced to form of document. other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms

of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained

Exception 1—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved

Exception 2—Will "[admitted to probate in British India]" may be proved by the probate

Explanation 1—This section applies equally to cases in which the contracts grants, or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one

Explanation 2—Where there are more originals than one, one original only need be proved

Explanation 3—This statement in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

* These words in s 91, *Exception 2* were substituted for the words under the Indian Succession Act" by the Indian Evidence Act Amendment Act 1872 (18 of 1872), s 7

91.

Illustrations

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contract, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

by B

it,

judgment, the contract, the devise, etc., it is in reality declaring a doctrine of the substantive law of these subjects, namely in the case of a written contract, that

It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a prohibitive mental process,—the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of evidence are inadmissible in the substantive law; and this of course (like

when desired, (c) its prescribed forms, if any, and (d), the Intended external objects affected by it. Of these four, the first and the fourth are necessarily involved in every jurat act, the second and the third are important, but are always possible elements.

deemed by law to be the sole document was intended by the parties between them and therefore to be binding. *Wigmore* § 2401. The practical parts, in their former and inchoate shape, have no longer any jurat effect, they are replaced by a single embodiment of the act, in other words: When a jurat act is embodied in a single memorial, all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms

of their act. *Ignore* § 242. This rule is based upon an assumed intention on the part of the parties to the contract, disinclined to agree to its terms, and to put their ideas in such shape that there can be no misunderstanding, which so often occurs where reliance is placed upon oral statements. Written contracts presume deliberation upon the part of the contracting parties, on by the parties embodied in the contract, at common law, on that the best phrase best when the contents of a contract are submitted to the tribunal, *Ev* § 2, substituted into.

cited with approval by Lord Carson in *U Subramanian v Lutchman*, 50 C 338-38 C L J 41-28 C W N 1-44 M L J 602-50 I A 77 P C

instruments, or to contradict or alter them. This is a matter both of principle and policy, because such instruments are, in their own nature and origin, entitled to a much higher degree of credit than parol evidence of policy because it would be attended with great mischief if those instruments, upon which the evidence is based, are by loose collateral evidence. *Charan, W R* 68 (69) which requires the

Statute of Frauds In all these cases, the law having required that the evidence of the transactions should be in writing no other proof can be substituted for that, as long as the writing exists, and is in the power of the party. *Green* *Ev* § 86. In the second place oral proof cannot be substituted for the written evidence of any contract which the parties have put in writing. Here the written instrument may be regarded in some measure, as the ultimate fact to be proved especially in cases of negotiable securities and in all cases of written contracts, the writing is tacitly agreed upon by the parties themselves, as the only repository and the appropriate evidence of their agreements. The written contract is not collateral, but is of the very essence of the transaction. If for example, an action is brought for the use and occupation of real estate, and it appears by the plaintiff's own showing that there was a written contract of tenancy, he must produce it, or account for its absence, if he were to make out a *prima facie* case, without any appearance of a written contract, the burden of producing it, or at least of proving its existence, would be devolved on the defendant. *Breuer v Palmer*, 3 Esp 213, confirmed in *Ramsbottom v Tunbridge* 2 M & S 431, *R v Rauden* 5 B & C 708 *Strotter v Boor*, 11 Bing 136, *Per Parke J*. But if the fact of the occupation of land is alone in issue without

1. respect to the terms of the tenancy, this fact may be proved by any competent
 variations of the tenant, notwith-
 an agreement in writing; for
 question *R v Inhabitants of*
 ing 239, 241. The same rule
 applies to every other species of written contract *Greenl Ev* § 87. Save and
 ings, there is a third class of document
 existence of which is disputed, and which is
 the parties, or to the credit of witnesses
 be proved in accordance with the provisions
 of section 64 *supra*, "I have always" says Lord Fentenden, in *Vincent v. Cole*,
 1 M & M 253, 'acted most strictly on
 only be proved by the writing itself
 danger of relying on the recollection of
 contents of written instruments; the
 the purposes of justice
 the writing does not
 there is no ground for
 written communication
 latter may
 of the writing
 may be pro
 4 Esp 213; *vide* to this section. In stating that oral testimony cannot be substi-
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although they relate to the which are
 directly in issue in the cause *Parke B*,
Newhall v. Holt, 6 M & W *Bethell v*
Blencowe, 3 M & Gr 119, *Howard v Smith*, 3 M & Gr 254 "The reason"
 *Peron Poole* "why such statements or acts are admissible, without

In this, may reasonably be presumed to be" *Taylor* § 410 But in *Mass*

the genuineness of a document produced is in question (*Vide* § 22) When
 to be

limitation it must be taken that even a third party if he wants to establish a

I made orally there being no docu-
 is in fact reduced to the
 be determined on a
 and the circumstances
 e terms are not reduced
 to the form of a document registration is not necessary and while the writing
 cannot be used as a document of title it can be used as a piece of evidence, & c

settlement made. Any antecedent documents and maps can be used solely

in the plaint, to the effect that he would make good any loss the (plaintiff) purchaser might incur in respect of the property sold, is not excluded by section 91 of the Evidence Act, and renders proof of the agreement unnecessary. *Sadhu v. Nga St*, U B R 1907, Evidence 1. When men agree to preserve by writing the remembrance of past event of which they wish to create a memorial either with a view to lay down a rule for their own guidance, or in order to have in the instrument a lasting proof of the truth of what is written, the truth of the written act must be established by the acts themselves, that is, by the inspection of the originals. *Upendra v Umesh Chandra* 12 C L J 25-6 Ind Cas 346. The consent in writing by the landlord to the division of a tenure has the effect of substituting a new contract for the old. It should be proved by the terms of the new contract. Section 91 of the Evidence Act does not apply to the terms of the contract.

application *Ganoda v Girish*, 4 Ind Cas 400. As required by ss 250 and 251, of the Code of the Civil Procedure, the warrant must have been in writing and therefore, under s 91 of the Evidence Act, the fact, that the warrant gave

admissible. *Sheo Ho v King-Emperor*, 3 L B R 128. Previous conviction should, regard being had to the provisions of this section, and section 511 Cr P.C. Code, be proved by copies of judgments or extracts from judgments or by any other documentary evidence of the fact of such previous conviction, if those convictions is, having warrant or justification. *Lasin* 70. When a dying declaration is not evidence, but the precise statement of the Magistrate who recorded the statement or some one who heard it. This section does not apply to such a document. *Gowindas v Emperor*, 36 C 659-13 C W N 659-10 Cr L J 186-2 Ind Cas 541. Section 91 of the Evidence Act has no application to matters embodied in the special diary under s 172 of the Criminal Pro. Code.

1.

- Ind Cas 766 An agreement within the meaning of section 10 of the Evidence Act, reduced to writing, is admissible.

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found

gift has been validly made in accordance with Muhammadan law *Ali Baksh v Ghuras*, 28 Ind Cas 180 = 18 O C 122 Where the terms of a compromise are found to be set out in a petition, the petitioner is to prove the terms of the compromise and oral evidence would not be admissible to vary or alter its terms *Bharora v Sukhdar*, 12 A L J 993 There is no rule of law that the only evidence of an agent's authority admissible in evidence is a written power of attorney The fact can be proved by evidence, *alunde*, and so far as third parties are concerned, non the-less so because the agent was appointed under a written document executed by the principal. There is nothing in section 91 or section 92 of the Evidence Act to preclude such third party from proving the existence of a particular relationship between the persons who respectively executed and accepted the power of attorney, though the terms which govern such relationship appear to be in writing *Lala Nanakchand v. Mahammad Abzal*, 279 P W R 1912 The object of s 10 A of the Dekkan Agriculturists'

the parties but embodies only some of the conditions, oral evidence to prove

judicial determination of the meaning of the language of parties to an agreement though the parties may not testify as to their intention. *Morris v David Jones*, 125 Ind Cas 867 = Ind Rul (1930) P C 231 It is not necessary to get a family settlement reduced into writing and get the writing registered Oral evidence on the point of the alleged settlement is therefore admissible *Rangu v. Lal shiman*, A I R 1930 Bom 438

When the terms of a contract or of a grant, or of any other disposition of property have been reduced to the form of a writing Where a transaction

memorial may be termed the integration of the act : i. e., its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their

material for the purpose of determining what are the terms of their act *Wignore* § 2425. It is for this reason that whenever the parties to any contract or grant or other disposition of property have set out its terms and conditions in a writing, which they presumably intend to be a record of the transaction, the law forbids any attempt to establish any other terms by means of oral evidence. *Powell* *Ex p* 181. The moment an oral contract is reduced to writing, it is not open to any of the parties thereafter to seek to prove the term of contract referring to the original oral agreement and this section applies not only to cases where the contract is brought about or concluded by the writing, but also where the contract having been originally made by parol is subsequently reduced to writing. Where the parties reduce the terms of a contract into writing, it clearly indicates the contemplation of the parties that the terms would be reduced to a form where there could be no question at all as to what the terms were and the undoubted policy of the law is that whichever parties have taken such precaution it is the document itself that must be produced and proved as evidence of the contract subject of course, to any rules as to secondary evidence. *Kappu Suami v Chinnu Suami*, 28 L. W. 234-111 Ind Cas 671-A I R 1923 Mad 546. Thus, where a contract of agency had been orally made between the parties, but had subsequently been put into writing and signed by them, it was held that the document was only admissible evidence of the agreement. *Morris v Delobel Flipo*, (1892) 2 Ch 352; *Phip* *Ex p* 7th Ed p 547. Having regard to the terms of this section, what the Court has got to do is to find out the real contract between the parties. *Meenakshisundaram v. Chenchu*, 109 Ind. Cas 18-A I R 1928 Mad 459. The fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved because of the inadmissibility of the document. *Maung Tan v Ko Tu*, 111 Ind Cas 472-A I R 1928 Rang 196. But where an award in writing which effected a partition of joint family properties, plainly and unambiguously effected an out-and-out partition among all the members of the joint family, held that extrinsic evidence was admissible to explain or control its terms, to show for instance that there was no separation between two of the members inter se. *Babu v Gakuldass*, A I R 1928 Mad. 1064-55 M L J 182-112 Ind Cas 184. The agreement to refer to or other disposition of property and so the *Ram v Lala Ram*, 116 Ind Cas 853-A. A will may be created by word of mouth, when put in writing the document itself or secondary evidence of the same should be tendered. *Mahomed v Bibi Marian*, 5 Pat 484-117 Ind Cas 633-A I R 1929 Pat 410. When a plaintiff alleges that possession of immovable property has been given to the defendant as security for a loan of hundred rupees or upwards, but without the execution of a registered instrument, oral evidence is not admissible to prove the transaction. *Maung Sa v Maung*

have been reduced to the form of a document, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible. *Maung Pan v. Ma Bue*, U. B. II (1892 1896) Vol. II, 347.

1. Terms of a contract. The general rule laid down in section 91 of the Act is, that when the terms of a contract have been reduced to writing, no evidence shall be given in proof of terms of the contract except the documents itself, or, in certain cases, secondary evidence of its contents. *Sri Dutt v. Bodri*, 15 R. D. 339, *Narain v. Rani Mohini*, 53 A. 114=1931 A. L. J. 61=A. I.

From the mere fact that a bill of exchange or hundi has been executed, it does not necessarily follow that the whole of the contract between the parties

dence of an agreement as well as of what took place when the agreement was made to prove the agreement if the written instrument is not produced. *Iyan-latesh v. Ganesh*, 61 Ind. Cas. whenever the terms of a contract are inadmissible in evidence the *Ishai Das*, 3 Lah. L. J. 157=60. 23 Bom. L. R. 767=63 Ind.

parties been reduced to writing and the of the contract of loan but if the hundies

then it is the oral terms proved and this section is 180=57 Ind. Cas. 391. If contract contemplate the fact it is a question of construction is a condition or term of desire of the parties as to will in fact go through either because the condition a contract to enter into and the reference to the mere formal document may be ignored. 4 P. L. J. 580=(1919) Pat. 305=53 Ind. Cas. 832. When it was admitted that the terms of the contract were reduced to writing and as no oral evidence was admissible to prove the said terms, the suit should have been brought within three years of the date of the transaction if it could be maintained on the original consideration. *Gobinda v. Ram Chandra*, 29 C. L. J. 508=51 Ind. Cas. 945. Oral evidence to prove admissible under it 22 C. W. N. 416=4.

controlled by final expression of obligation his own language. *Moung Po Thet v. Irua* Vol. II, into at a the writ

N. 147 (P. C.)=32 C. 96=31 I. A. 188. A question as to who the contracting parties are is not a question as to the terms of the contract, within the meaning of this section. *Venkata Subbiah v. Gobindarajulu*, 18 M. L. J. 1=3 M. L. J. 250=31 M. 15. Where an agreement is inadmissible, oral evidence is barred.

Samsam v Ram S.
 procedure does not
 need to be in the form
 of the suit or in
 proceedings. The

agreement or compromise itself, that is made out of Court may be in writing or by word of mouth. If the Court did not record the terms of it, this section is no bar to the suit being brought on the terms of the compromise. *Bija v On Gaing*, 3 L. M. R. 243. Ordinarily when the terms of a contract preceded by proposals, negotiations, conditional acceptances, counter proposals and so on are reduced finally to the form of a document signed by one or both of the parties the strong presumption is not that there are two independent contracts (the first an oral contract the second written contract) but that the written contract is the only final contract between the parties and when a contract is once reduced to writing no other evidence can be given of its terms. *Kotam Reddi v Vennalalant*, 20 M. L. T. 41—(1916) 2 M. W. N. 33—31 M. L. J. 240—35 Ind. Cas. 18. When the terms of contract for payment of interests were excluded from evidence by Court of Wards Act oral evidence is admissible to prove the terms of contract. *Ism Bahadur v Dassur*, 17 C. L. J. 399—19 Ind. Cas. 818. The rule of evidence, which excludes evidence of the terms of a contract which has been reduced to the form of a document has nothing to do with an action for money had and received the basis of which action is not the contract reduced to the form of a document but the doctrine of equity that a person who has received a sum of money from another for a consideration which has wholly failed must return the money to the payer. *Bay Nath v Sahj Ram* 16 Ind. Cas. 33.

Promissory note—Proof of oral contract of loan. Apart from the promissory note there is always a contract to repay a loan and such contract can be proved independently of the instrument. It is only the other contract relating to the rate of interest which can only be proved on reference to the instrument itself. So even in cases where the lending of the money and the execution of the promissory note are contemporaneous the plaintiff is entitled to maintain a suit for recovery of the money lent and to adduce evidence other than the instrument or the promissory note itself in order to prove the loan. *Dhaneswar v Ramrup Gir* 7 Pat. 845—111 Ind. Cas. 482—9 Pat. L. T. 471—A. I. R. 1928 Pat. 133. "It is a well established rule that a contract to repay a loan, cannot be proved by evidence other than the instrument or the promissory note itself and if he can satisfy the court on any other reason why a decree should be granted in his favour." *Mahamad A. I. R.*

1081 Pat. 293—133 Ind. Cas. 685, see also *Lal v Ram* 130 Ind. Cas. 347, 10 Pat. 506. But a Full Bench in *Khan v Ram Mohan* decided differently. The question is whether the transaction is separable from the promissory note and cases where the execution of the promissory note and the payment of the money are part and parcel of the same transaction, it being held that in the former case the debt could be held proved, although the promissory note was not admissible in evidence, while in the latter cases it could not and the suit must fail if the promissory note itself be inadmissible in evidence. In that case the cases of *Sima* 34 A. 153—13 Ind. Cas. 685, *also* 10 Pat. 506—133 Ind. Cas. 685, *Sheik Chari* 10 Pat. 506—133 Ind. Cas. 685. But the case in *Sheik Albar v Sheik Khan*, *supra* was sought to be explained away in a later case in the same Court in *Promotha Nath v Dhanlanath*, 23 C. 851. In the Madras High Court in *Varlagaddi v Gotantala*, 29 M. L. J. 111—15 M. L.

the transaction is separable from the promissory note and cases where the execution of the promissory note and the payment of the money are part and parcel of the same transaction, it being held that in the former case the debt could be held proved, although the promissory note was not admissible in evidence, while in the latter cases it could not and the suit must fail if the promissory note itself be inadmissible in evidence. In that case the cases of *Sima* 34 A. 153—13 Ind. Cas. 685, *also* 10 Pat. 506—133 Ind. Cas. 685, *Sheik Chari* 10 Pat. 506—133 Ind. Cas. 685. But the case in *Sheik Albar v Sheik Khan*, *supra* was sought to be explained away in a later case in the same Court in *Promotha Nath v Dhanlanath*, 23 C. 851. In the Madras High Court in *Varlagaddi v Gotantala*, 29 M. L. J. 111—15 M. L.

J. 484 and in *Mulhu v Vishuanatha*, 38M 660=21 Ind Cas 864, s 91 of the Evidence Act was relied upon and it was held that in circumstances similar to the Allahabad Full Bench Case, oral evidence could not be given in proof of the loan; see also *Alimam v. Kolselti*, A I R 1932 Mad 693=63 M L J 303. In *Chandra* . . . A I R 1922 Lch 307=66 Ind Cas 201=2 . . . also took the same view. The point of view whether the fact of payment of a sum of money can be regarded as a term of the contract does not seem to have been considered by the learned Judges who decided the case. In a recent full Bench case of the Oudh Chief Court, it has been held that in spite of the provisions of s 91, it is open to the party who has lent money on terms recorded in a promissory note which terms ought to be inadmissible in evidence for want of proper stamp duty to recover his money by proving orally the advance of the loan. *Kunwar Bahadur v Suraj Bihari*, A. I R 1932 Oudh 235, see also *Krishnan v Rajmal*, 24 B 360=2 Bom L R 25; *Duasia v Idu*, 74 Ind Cas 813=26 O C 361, *Narain v Guja*, A I R 1929 Oudh 349, *Mung Kye v. Ma Ma*, 10 L J R 51=74 Ind Cas 84 (F B). For further discussion on the subject vide pp 1007—1009 *infra*.

Terms of a grant. Under this section grant when it has been reduced to the form of secondary evidence of its contents is admissible only under the terms of section Mahomed Khan v. Shoo Bihari, A I R 1929 Oudh 447=6 O W N 353. Under section 85, sub section (2) of the B n.

Oral evidence of such grant is also excluded by section 91 of the Evidence Act. *Jarip Khan v Durfa Beua*, 16 C L J. 144=15 Ind Cas 116=17 C W N 59.

want of registration—whether secondary he contract can be received. *Nya Sheru*. The combined operation of s 49 of the Evidence Act is to completely partition. In other words it would prevent the plaintiff from proving that in di

intention of 927 Nag 113 property can to determine van 103 Ind Cas. 153, see F 276=103 Ind Cas 281=A. I Cas 47=1923 Rang 57; *ngdas v Uttamchand*, A I R deed can be used as evidence

terms of a partition deed. *Mg Po Leen v. Ma E Mai*, 1 Bur. L J 111. Secondary

evidence of a lost unregistered document affecting an interest in an immovable S.

oral agreement to lease made before the execution of the document, in order to support a claim

Kashnam 71 In

1923 P 111 W

tered, the tenant

formance *Damodar v Masoodan Singh*, 105 Ind Cas 172: *Islaram v Sukla*,

111 Ind Cas 358 = A I R 1928 Nag 378 Though a lease for agricultural

purposes for more than a year can be reduced to writing, it cannot be received unless registered. The document

out other evidence of the transaction

349 = 79 Ind Cas 26 = 5 Pat L T 511, *Ram Chandra v Tama*, 11 Bim L R.

390 = 36 Pat 500 = 15 Ind Cas 830, *Jasod v Anulau v Ram Kuar*, L R 34 537,

Budhan Felt v Madanmohan, 3 Pat L T 185 = 63 Ind. Cas 653 An un-

registered deed of lease is not admissible to prove that the property to which

it relates was let for a term of three years nor can oral evidence of the terms of

the lease be tendered in such a case *Madar v Raul*, 63 Ind Cas 90 The

plaintiffs having agreed to convey a house to F received the purchase money,

executed a sale deed,

suit for possession of

deed, secondary evidence

Held, on second appeal, that under s

was compulsorily registrable, and

sale Section 91 of the Evidence

evidence of sale deed *Gangabisan*

Section 49 of the Registration Act prohibits unregistered lease from being given

in evidence whether the suit be for specific performance or for damages, and

section 91 of the Evidence Act forbids any other evidence from being given of

the agreement *Sieeramulu v Ramaswami* 33 M L J 596 Where the tenant

wrote to the landlord to grant a lease in pursuance of an oral conversation

and the landlord sent a reply which in law amounted to an agreement to lease

but which was rendered inadmissible for want of registration and the tenant

thereupon sought to fall back on prior oral agreement, held that if there

was a prior oral agreement, it was either the same as that in interest or it was

modified by the letters and that in neither case did s 91 of the Evidence Act

admit oral

125 Ind C

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pro note payable otherwise than on demand, bearing an one anna stamp is an

insufficiently stamped document and is, under section 34 Stamp Act, inadmissi-

ble in evidence for any purpose even on payment of penalty In such a case

a person is not entitled to fall back upon the original consideration of the

contract as no other evidence of the terms of the document which is the best

evidence in the case is admissible under this section *O Gorman v Mahtab*

Singh, 92 P R 1898, *Chandan Singh v Amritsar Banking Co*, 2 Lab 330 =

1923 Lab 307 = 66 Ind Cas 201.

Where a plaintiff is able to prove the loan independently of and without

the assistance of a promissory note, which cannot be admitted in evidence for

some reason, he can fall back upon a claim for money lent *Ram Sawrup*

v Jasodah 9 A L J 72 = 31 A 153 = 13 Ind Cas 133 [Since over

ruled by 53 A 114 (F B)] So a creditor can fall back on the original

transaction and recover his money on its basis when it is found or con-

ceded that the document or instrument which he had obtained from the

debtor was ineffective to establish any contractual relation of debtor and

creditor between them so as to serve as a basis for a suit in a Court of law,

Udaram v. Laxman, 104 Ind. Cas 470 = A L R, 1927 Nag 241. Where a person

1. sued to recover money on the but the *sail* that appeared to be a duly stamped *bill*, that if the plaintiff was able to prove *any* money he was entitled to a decree. *Launjari Chaudh v Parsotom Chaudh*, 25 A L J 567=103 Ind Cas 631=A I R 1927 All 563

The mere existence of an unstamped receipt which is inadmissible in evidence does not prevent other *any* *Ram prosad v Nathu Ram*.

If a creditor has a cause of action or has executed a promissory note separate from and independent of the note he can recover upon such cause in case the note for any reason as for want of being properly stamped cannot be put in evidence. *Hashi Prosad v Panna Lal*, 74 Ind Cas 379=L R 4 A 377=1923 A 729 A promissory note which is insufficiently stamped if sued upon may give rise to three kinds of transactions. Either the contract may be considered as contained wholly in the promissory note or bill of exchange is in all (b) to s 91 of the Indian Evidence Act, in which case the plaintiff cannot sue on the promissory note,—he can not sue at all, or secondly the promissory note may be regarded as a conditional payment of the amount of the loan in which case, of course, if the promissory note is insufficiently stamped it is only the plaintiff may sue on the loan; or thirdly passed as security for the loan, in which case plaintiff to sue on the promissory note at all or not, he can bring a suit on the loan. *Jacob* 132=102 Ind Cas 178=A I R 1927 Bom note there is always a contract to repay a loan independently of the instrument. It is only the other contract relating to the rate of interest which can only be proved on reference to the instrument itself. *Dhaneshwar v Ramrup* 7 Pat 845=111 Ind Cas 482=9 Pat L T 171=A I R 1928 Pat 426, *Chedu Singh v Jagannath*, 26 A L J 416=108 Ind Cas 912=A I R 1923 All 297, *Nanhu Singh v Girja Bux*, 6 O W. N 649=119 Ind Cas 865=A I R 1929 Sind 399, *Ram Sarup v Jasodha Kunwar*, 9 A L J 72=13 Ind Cas 138=31 A 158 But where the money was borrowed simultaneously with the execution of a promissory note by the borrower and it appeared that the note was unstamped. *Held* that the promissory note could not be sued upon and that it was not a case in which the suit was maintainable on the basis of the original contract either as there was none. *Tenkata v Mumtaz* 6 Mys L J 157 If a hundi is an embodiment of the whole of the contract between the evidence and cannot be looked at for the the contract, other evidence to prove the allowed But where the hundi embodies

form

the original consideration, even when a pro note has been executed and when for any reason the document is excluded. The reasonings of the several decisions apply not merely to unstamped documents, but to any case in which reliance cannot be placed of, or a collateral. *White, U B* 1003

under section 31 of the Stamp Act, cannot according to ss 65, 91 of the Evidence Act, be given. *Bakshi Ram v Kalka Ram*, 42 P R 1895. A person who takes a promissory note on account of a pre-existing debt, may, if the document becomes inadmissible in evidence sue upon the original consideration, disregarding the instrument, provided he has not endorsed, lost or parted with the same. But if the original cause of action is the promissory note itself and does not exist independently of it, he cannot succeed without the instrument, according to s 91 of the Evidence Act, as the instrument is the only contract between the parties. *Sheo Das v Kanhaya Lal* 61 P. R 1893. Where a promissory note itself is the agreement of loan a plaintiff cannot sue on the original consideration and the promissory note must be proved. *Ram Singh v Perumal*, 11 S L R 150-32 Ind Cas 582, *Bail Singh v Bhuguan*, 7 Bur L T 95-93 Ind Cas 975-7 L B R 101.

When it is proved that certain *hundis* were renewed from time to time and the suit, but the r and could not be upon the *hundis*

that were given prior to the last renewals and secondary evidence could be admitted to prove them. *Jagan Prasad v India Natl*, 12 A L J 361-86 A. 259-23 Ind Cas 589. Where the contract in case of a loan and a simultaneous promissory note has been reduced to writing in the form of the note which contains the definite terms of the contract, Courts cannot resort to inconsistent or consistent implied contracts in such cases, simply because the contract as entered in the promissory note cannot be admitted in evidence. *Muthu Sasthigal v Viswanath Pandara*, 14 M L T 520-(1914) M W N 58-26 M L J 19.

Any matter required by law to be reduced to the form of a document. Oral Evidence can not be substituted for any instrument which the law requires to be in writing, such as records public and judicial documents, official information or examinations, deeds of conveyance of lands, Wills, other than nuncupative, promises to pay the debt of another person, etc., *Taylor* § 399. In all these cases the law having required that the evidence of the transaction should be in writing no other proof can be substituted for that, so long as the writing exists, and is in the power of the party. *Ibid*. Instances of this class in India are —

(1) Judgments and decrees in civil cases. *Vide* Or XX, and Or XXXI, of the Civil Procedure Code.

(2) Depositions of witnesses in civil cases, *Vide* Order XVIII of the Civil Procedure Code.

(3) Judgments and orders in criminal cases. *Vide* §§ 367, 424 of the Criminal Procedure Code.

(4) Deposition of witnesses in criminal cases. *Criminal Procedure Code*, sections 354-362.

(5) Examination of an accused person. *Criminal Procedure Code* s 361.

(6) Confessions of an accused person. *Criminal Procedure Code* s 164.

(7) Lease of immovable property from year to year or for any term exceeding one year. *Vide* s 107 of the T P Act. But this does not include an agreement to lease. *Nanda v Sarat*, 6 Ind Cas 563.

(8) Deed of mortgage when the principal money secured is one hundred rupees or upwards, other than a mortgage by deposit of title-deeds. *Vide* s 59 of the T P Act.

(9) Gift of immovable property. *Vide* s 124 of the T P Act.

(10) Sale of immovable property of the value of one hundred rupees and upwards. *Vide* s 54 of the T P Act.

91. (11) adred rupees
and upwar
(12) Rule s 111
of the Criminal Pro Code
(13) Acknowledgment of debt under s. 19 of the Limitation Act.
(14) Acknowledgment of debt by part payment of debt under s 20 of the
Limitation Act
(15) Assignment of copy right. Rule s 5 of the Copy Right Act.
(16) Agreement without consideration (Rule s 25 of the Contract Act)

Box Pitumal v
underlying s. 360
on the grounds of
on oath if the
accuracy of the record of such examination is to be vouchsafed, particularly when
it is to be utilised as a basis for a possible perjury in future for it would be
unsafe to use against a complainant what on face of it purports to be only a
substance and not the full version of his examination. But under the present
state of the law, it cannot be contended that the substance of the oral examina-
tion is inadmissible in evidence under s 91 of the Evidence Act in proof of the
statement therein contained. *Bhagirathi Bai v Emperor*, 89 Ind. Cas. 713-26
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able. *Queen v Nga*, L B R (1872-1892), 572

Mortgage : When in a suit for redemption of a mortgage the existence of
the mortgage possession on
the strength ground of a
contract of sale evidence to
rebut the existence of such a contract. Held also that a pycet paing which
reported an actual sale could not be considered as a document recording the
terms of a contract for the purpose of section 91 of the Evidence Act. *Maung
Ain v Maung Sun*, 5 Rang 679. Where on the back of a mortgage deed an
endorsement of the payment was made and it was also added that the mort-
gages were extinguished, the endorsement requires registration. But oral evidence
is admissible to prove the payment of mortgage amount, apart from the endorse-
ment. *Labhu Ram v Sazaur*, 100 Ind. Cas 129-A I R 1927 Lab 237. If

transfer and have an account taken as to what was due on the mortgages
)=A I R 1926
contract relating to
ment, no evidence
document itself
Where a mortgage
stantial evidence

such as recitals in deeds referring to the mortgage, extracts from account books and by a transfer of a share of the mortgage *Held* that the written

per mensem compoundable yearly and the defendant alleged in a suit on the
 the interest
 agreement
al v Abdul
 a mortgage
 a produced,
 transaction.

Maung Po v. Ma Le, 3 Bur L J 238—84 Ind. Cas 468—A I R. 1923 Rang.
 102 A mortgage which ought to have been by a registered instrument cannot
 be so proved by other forms of evidence *Maung Tun v Maung Khan*, Rang
 441—A I R 1925
 title deed, in the
 open to the plaintiff
 document was depo

But as the defendant executed a document in writing the Court must refer to it
 in order to ascertain what the contract was *Chunilal Lal v Vital Das*, 24 Bom.
 L R 502—68 Ind Cas. 1005—A I R 1922 Bom 440 According to section
 91 of the Evidence Act, the terms of a mortgage can only be proved by the
 production of the mortgage deed or of secondary evidence of its contents, in
 case it is shown to be lost or destroyed,
 ment fails to produce it after notice
 1907, 4th Qr Evidence 13, *Fateh Sing*
Samandar, 276 P L R 1913—20 In

of transaction completed independently of them and not embodying terms of
 evidence
 ut where it
 nature of
 the transaction *Holka v Nanupan*, A I R 1932 All 259—1932 A L J 101.

Sale Where property is
 the document cannot be relied up
 be referred to for the purpose,
 ween the parties and to prove delivery of possession To such a case this
 section does not apply *Keshwar Mahton v Sheonandan*, 10 Pat L J 449—A
 I R 1929 Pat 620 An unregistered sale deed can not be made basis for suit
 for specific performance as if it were merely document creating right to obtain
 another document *Duan v Guba Chan*, A
 227 Section 49 of the Registration Act
 17 of that Act and s 91 of the Evidence Act
 an unregistered document, which is
 being given in evidence as to the
Pe v Maung Sein, 7 R 411—A I R
 evidence of the terms of a dispositi
 applicable to both classes of documents mentioned in section 91 Consequently

91. to take effect for want of registered conveyance *Mg Myat v Ma Dun*, 3 Bur. L J 78-81 Ind Cas 857-A I R 19'4 Rang 214 Where unregistered deed of sale is inadmissible in evidence other evidence of the contract of sale is inadmissible *Parmeshri v Autar Singh*, 3 Lah L J 173; *Boggu v Tara Singh*, 5 P L R 1919 So also where an agreement to relinquish ex proprietary rights which should be in writing and registered was not executed, held that oral evidence was not admissible regarding the agreement *Ram Nath v Special Manager*, 12 L R 1 Rev The plaintiff can rely upon an oral sale accompanied by delivery of possession in a case where a sale deed was executed in evidence

Ma Anas Paul, 34

property under a rep

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section 91 of the Evidence Act *Safar Ali v Mohesh*, 23 C. L J. 122-84 Ind Cas 956 After acknowledging the receipt of consideration in the deed of sale, a vendor is not estopped from showing that he had not actually received the consideration stated in the deed *Puthi v Nand Kishore*, 25 Ind Cas. 27.

Deposition Since the act of deposing is a physical act which can always be proved by any one who has heard the statement being made, the fact of deposing might be proved by any one who has seen and heard the witness *Ganapathi v Sakharayappa*, 115 Ind Cas 140-A I R 1929 Mad 187. But under Order 18 rule 5, C P Code, it is necessary that the deposition of a witness in an appealable case, in order to bind him to the statement recorded therein, should be read over to him This provision is mandatory and not directory. The omission to do so renders the deposition inadmissible in evidence against him on his subsequent trial for perjury Section 91 of the Evidence Act excludes

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recognition made is the only admissible proof of what was said, but in a trial, the Magistrate need not generally record the evidence, and where no obligation is laid upon the Judge or presiding officer by law to reduce depositions or statements to writing, they may be proved by the presiding officer or by persons who heard them, in order to establish the fact that they were made *Howard v Rustamji*, Rat Un Cr C 334 The accused was charged in the

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writing, was

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the oral evidence of the contents of the accused's deposition at the trial before the Magistrate was inadmissible under this section *Queen Empress v Bapu Nawari*, Rat Un Cr C 401 Under section 91 of the Evidence Act the document embodying the deposition is the only evidence of the statement charged having been made under section 80 of the same Act, it is admissible only when it was taken in accordance with law *Kadir Pakiri v. Emperor*, 18 Cr L J. 966-42 Ind Cas 326.

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when departmental enquiry was going on was not a matter required by law to be in writing, and section 91 of the Evidence Act had no application. The Magistrate therefore was competent to prove the confession. *Haydar Razvi v. King Emperor*, 12 A. L. J 306-36 A 222=15 Cr L J 569-25 Ind. Cas 321. Where statements made by an accused person are inadmissible in evidence, secondary evidence of the contents of those statements is inadmissible also under this section. *Queen Empress v Viran*, 9 M 224=2 Weir 125; *Reg. v. Bai Ratan*, 10 B H C 166. The confession of an accused person made to a Magistrate holding an enquiry is a matter required by law to be reduced in the form of a document within the meaning of section 91 of the Evidence Act, and no evidence can be given of the terms of such a confession, except the record, if any, made under s 364 of the Code of Criminal Procedure. *King Emperor v. Gulabu*, 11 A. L. J 286=14 Cr L J 211=19 Ind Cas 507=35 A 260

Acknowledgment of debt. Secondary evidence of the contents of an acknowledgment, used to keep alive a cause of action beyond the ordinary period of limitation, can be given, where the original is proved to have been lost or destroyed, the effect of paragraph 2 of section 19 of the Limitation Act of 1877 not being absolutely and always to exclude secondary evidence in such a case. Para 2 of the above section belongs to that branch of the law of evidence contained in section 91 of the Evidence Act. *Shambu Nath v Ram Chandra Saha*, 12 C 267. Section 19 of the Limitation Act (XV of 1877) says clearly that oral evidence of the contents of an acknowledgment may not be received; nor has the Act made any saving of acknowledgments received or given back before the Act came into operation. *Zulnissa v Molidev*, 12 B 268.

Search list. A search list is not evidence of the facts stated therein and this section, therefore has no application to it. It is simply a declaration, not on oath or affirmation or subject to cross examination, made by a police officer and the person's presence at the search that certain formalities were observed and certain events took place. Oral evidence may, therefore, be given as to what took place at the time of the search. *Public Prosecutor v Saralu Chennaya*, 2 Weir 776. This section, presupposes that, where a certain matter is required by law to be reduced to writing the writing is itself evidence of the matter so reduced, and the section does not apply if the writing is not evidence of the matter. A search list is not evidence of the matter stated therein and it does not therefore exclude oral evidence of such matter. *Public Prosecutor v Sarabu*, 33 M 413=8 Ind Cas 808=21 Cr L J 716. The search list prepared under s 103 Criminal Pro Code, is proper evidence of the matters which it should contain, viz the properties found and the place where they were found. *In re Mammadi*, 2 Weir 47=2 Weir 515. The provisions of this section do not apply to the case of a search list prepared under s 103 of the Criminal Procedure Code, *In re Solai Nadick*, 8 Ind Cas 173=21 M L J 281=11 Cr L J 576

Application of section 91 to an oral statement made by a witness to a Police officer. "In discussing the non applicability of section 91 of the Evidence Act to an oral statement made by a witness to a police officer and entered by him in his special diary I shall show that the distinction between the oral

Procedure prohibits the use of oral statements made by a witness to a
gating officer and that is the point in question. In the
91 of the Indian Evidence Act has no application to an oral

to an investigating police officer, for it is not a matter, which is required by law to be reduced to the form of document (see *Reg v Ulam Chand*, 11 B H C R 120 and *Empress v Kali Churn*, 8 C 151). In the third place the entry in the diary of the police officer, correctly speaking, is not the statement either oral or written by the witness for any legal purpose. It is by habit of thought

with the depositions of witnesses statement made by a witness by the way in ordinary parlance. This calls for speech and writing are two distinct

objective entities perceptible by two different senses. Speech is heard by the ear and writing is seen by the eye. A deaf person is not a possible witness to a speech nor a blind person to a writing. Both are means for expressing ideas. A may state orally that a certain event happened or may write that it happened, but in order to constitute the oral or the written statement of A to be his act in the eye of the law it must have been made with a consenting mind as his own juristic act. A making an oral statement within the hearing of B C and D the oral statement of it under section 8, illustration (c) of the Evidence

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made by A, in the presence of B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, is not allowed to

deemed to represent his own oral statement and his own juristic act' Per *Karamat Husain J in Rustam v King Emperor*, 7 A L J 168 (481)

Exception 1

showing that the p

involves two element

such action, or, as

the first element alone is mentioned as essential. *Greenl Ev* § 38(a) This

presumption is based on the maxim *omnia presumuntur rite esse acta*, that is

that will be presumed to have been done which ought to have been done. The

general rule is that where the contents of a writing are desired to be proved, the

writing itself must be produced, or its absence is sufficiently accounted for

before other evidence of its contents can be admitted. *Greenl Ev* § 563 (a)

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Campb 131, *R v Ireland*, 3 *Campb* 432, *Greenl Ev* § 563 (g)

Will annexed when no executor is therein appointed or the appointment of executor fails), or other proof tantamount thereto of the admission of the Will

in the Probate Division is legal evidence of the Will in any question respecting personality. *William on Executor*, 11th Ed. 206. It can only be granted to an executor. *Behary Lal v. Jaggo Mohan*, 4 C. 1. Probate of a Will can not be refused on the ground simply that it is what lawyers in ancient time called "inofficious" *Rammal v. Kalalkola*, 22

Under this exception the contents of a Will may be proved by the probate. Section (XXXIX of 1925) lays down that probate of Will from the death of the testator, and rend the executor as such

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the executor by virtue of the Will, not of the probate. The Will gives property to the executor; the grant of probate is the method which the law specially provides for establishing the Will. So long as the probate exists it is effectual for that purpose. *Kamal Lochun v. Nitruttun*, 4 C 560 (362). The law on the subject is the same as in England. *In re Ezekiel Joshua Abraham*, 21 B 189. Probate is an evidential ceremony. *Smith v. Miller*, 1 F R 180, *Ganapathi Iyer v. Siv mahi*, 36 M 375, *Mathuradas v. Goluddas*, 10 B 468; *Jehanger v. Kuliabai*, 27 B 281; *Bai Harkai v. Manellal*, 12 B 621. The probate is only conclusive as to the appointment of executors and the validity of the contents of the Will. *Hormusjee v. Bai Dhanabai*, 12 B 161, *Whicker v. Hume*, 7 H L C 124, *Braynath v. Anandamoyee*, 8 B L R O C 208, *Balgangadhar v. Sakwarbai*, 26 B 702, *Chintaman v. Ram Chandra*, 31 B 589. The probate shows that it was duly executed by the executor. *Bhabangana v. Harendia*, 17 C. W. N. 445-16 Ind Cas 48

Explanation I. "The learning on this head" says *Mr. Norton* "must be sought for in work grant, or disposition

Take the familiar from a series of letters passing between the parties" *Ailen v. Bennett*, 3 Taunt. 169; *Jackson v. Loue* 1 Bing 9. *Phillimore v. Barru* 1 Camp 513, *Wagner v. Wellington*, 25 L J

suffice if the contr party, provided su together. *Spardlow* .

a letter in which the with the letter. *Pearce v. Gardner*, (1897) 1 Q B 688, *Taylor* § 1026. It is sufficient if the contract can be plainly made out in all its terms from any writings of the party, or even from his correspondence. But it shall be collected from the writings, verbal testimony not being admissible to supply any defects or omissions in the written evidence. *Boydell v. Drummond*, 11 East 143, *Green* L v § 268; *Cox v. Middleton*, 2 L J Ch 628, *Ridgway v. Whorton*, 21 L J Ch 46, *Caddiel v. Skiamore*, 3 Jur N S 1185

Telegrams "Telegraphic messages are instruments of evidence for various purposes and are governed by the same general rules which are applied to other writings. If there be any difference, it results from the fact that messages are first written by the sender, and are again written by the operator at the other end of the line, thus causing the inquiry which is the original. The original message, whatever it may be, must be produced, it being the best evidence, and in case of its loss, next best evidence the

ark from which
message, and the
party sending

31. returned, are what would govern in construing the contract, provided both parties voluntarily and of their own accord sent their messages by the telegraph and thus adopted the company as their agent. So when a contract is made by telegraph, which must be in writing by the Statute of Frauds, if the parties authorize their agents, either in writing or by parol, to make a proposition on one side and the other party accepts it through the telegraph, that constitutes a contract in writing under the Statute of Frauds; because each party authorizes

the acceptance in the
with a steel pen an inch
long attached to an ordinary penholder, or whether it has a pen or a copper wire a thousand miles long. In either case the thought is communicated to the paper by use of the finger resting upon the pen, nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the office. We know that by the

admirable system regulating the government of the telegraphic companies, the original despatch is preserved and may be at all times procured for the proper purposes. The paper filed at the office from which the message is sent is of course the original, and that which is received by the person to whom it was sent purports to be a copy. If the despatch is sought to be used in evidence the original must be proved and its execution proved precisely as any other instrument.

in the same mode, before the copy can be received.
H 488, *Lurr Jones* § 53. By the decided

the communication sent in or the one received is to be deemed the original depends upon which party is responsible for its transmission, in other words, upon the question for whom the telegraph company is agent. If there is but a single communication, the despatch as delivered at the place of destination is the best evidence. In such case the telegraph company is the sender's agent, but if the message were sent in response to a request by letter to telegraph a reply, it appears to us that the company would be the receiver's agent and the despatch as handed for transmission the original. And generally in controversies arising between sender and the receiver, when the

the message
by telegraph
the point
for transmission

Burr Jones § 210.

Broker's
negotiation, as in
ness books and
of the transaction
and that which
Sales § 276. A
two parties (Sto
frequently acts

a proxy, a factor agent, but with this difference that the broker being employed by persons who have opposite interests to manage, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself. Thus his agreement is twofold and consists in being faithful to all the parties in execution of what every one of them entrusts him with. (*Dumas*, *l. c.* 1, tit 17, cited in story on Agency, p 28, in notes) But primarily he is deemed merely the agent of the party by whom he is originally employed. To make the other side liable to pay him brokerage, it must, we think, be shown that he has been employed by such party to act for

no parol evidence is admissible, but if they intend only to reduce into writing

fact, then I think they are entitled to give did not intend to reduce into writing exchanged, is it usually intended that these notes should constitute the whole of the contract? I think not. *Mr. Benjamin* in his work on the law of 'sales' lays down as the result of the authorities that the bought and sold notes do not constitute the contract. I think this proposition is clearly borne out by the case of *Scrimgeour v Archibald*, 20 L J Q B 529-17 Q B 115 [See especially the decision of *Mr Justice Erle* in that case] and also by the case of *Porton v Crofts*, 33 L J C P 189. In both these cases the distinction between making a contract and a memorandum showing that the contract has been made is pointed out. The result of those cases is that broker's notes as a memorandum may satisfy the Statute of Frauds but not exclude parol evidence. In *Clarton v Shaw*, 9 B L R 252, *Sir Richard*

have been furnished the plaintiff
Durga Prosad v Bhajan Ah,
 discussion as regards the evi

defen
 having been made between a third person and the defendant. In a suit

Court as to whether the mistake in the sold note was a bar to the plaintiff's suit for damages on the contract. *Held* that there was a contract between the parties for breach of which the plaintiff could sue for damages. *Mahomed Bhoy v Chutterput*, 20 C 854. In *Ah Sham Shole v Moothua Chetty* 4 C W N 453-27 C 403 (P C), a contract was made through a broker for the purchase of a quantity of paddy at a settled price. The bought and sold notes were in taken with the wrote thereon if wet. The ion until after of yellow rice. Plaintiff sued for

Explanation II Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in

North Ev 269

terms (a) of
 re a document
 as for instance,
 then contract,

etc., (*Sreejully v. Loharam*, 7 W. R. C. R. 384), it relates to some other independent money [Illustration]

Receipt
Smith
& J.
attract or a grant or
tion and it does not
Narain, 80 Ind Cas
which is inadmissible in
prove discharge by pay-
a document relied on,
eds is held to constitute a
inadmissible in evidence
is inadmissible to prove
of the Evidence Act is no

41 M. L. J. 297

and by this section to
z, or by action, and is
admissible in evidence,
Tansittart, A. W. N.,
require to be
n for a contract
at Chandra v
ere a receipt for
amount can be
proved *abundant* by virtue of section 91 of the Evidence Act *Chhutan v. Mul*
Chand 8 P. R. 1917=23 P. W. R. 1917, see also *Sharaf Ali v. Jogandar* 93
P. R. 1916

Existence as distinguished from terms of contracts, or of a grant or any
other disposition of property Extrinsic evidence is sometimes admissible to

evidence shall be given in proof of the terms of such a contract, grant or
disposition of property except the document itself. This however refers only to
the method of proof of the terms of contract, grant or disposition of property,
and this being so, the
induced in proof of the
I R. 1922 P. 222 The
oral evidence, although
be proved for want of
sh) 43=61 Ind Cas.
been in writing is not produced, section 91 of the Evidence Act unlike as in the
case of documents required to be in writing only bars proof of the terms of the

there be any. *Nago v. Tukaram*, 49 Ind. Cas. 843. Where the plaintiff in a
suit for rent showed that the suit was not based exclusively on a *Kabuliyat*
executed by the defendant, but also on the collection of rent, and the plaintiff
did not produce the *Kabuliyat*, but filed collection papers to prove that the
defendant was holding at the rate claimed by the plaintiff in the year, collection
papers were admissible in evidence, as they were not put in proof of the terms
of the *Kabuliyat*, and section 91 of the Evidence Act did not apply. A *ruiyat*

3 year *Gouri* S
d deed cannot

properties claim

joint properties

Ind. Cas 83

of the contract.

the parties sign

case must be decided upon its own facts, and the real question is whether a document in question is a true award of arbitrators, or merely a deed of partition by the parties themselves disguised in the form of an award in order to escape

the only evidence document itself,

in proving aliunde,

plaintiffs could

partition *Sukh*

Dial v Mani Ram, 29 P R 1915=27 Ind Cas 489=29 P R. R 1916.

432; *R v Langton*, 2 Q B D 296; *Phup Ev.* p 500. The fact of birth, baptism, marriage, death, or burial, may be proved by parol testimony, "though a narrative or memorandum of these events may have been entered in registers which the law required to be kept" The reason for the above is that the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of the fact, which may furnish a satisfactory and convenient mode of proof, but can not exclude other evidence, though its non-production may afford ground for scrutinizing such evidence with more than ordinary care *Jivandas v Francis*, 7 B H C R 45 p 63, *Evan v Morgan*, 2 C & J 453, *R v Ahson*, R & R. 190; *Lady Limerick v Lord Limerick*, 32 L J P & M 22; *Taylor* Vol I 5th Ed. 413.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a

Exclusion of evidence of oral agreement

document, have been proved according to the

last section, no evidence of any oral agreement

or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, * [want or failure] of consideration, or mistake in fact or law.

Proviso (2) —The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering

* The words "want or failure" were substituted for the words "want of failure" by s 11 of the Indian Evidence Act Amendment Act, 1872 (18 of 1872).

2. whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4)—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved.

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6)—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

(a) A policy of insurance is effected on goods ‘in ships from Calcutta to London.’ The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved

had always been regarded as part of the estate and was meant to pass by the deed cannot be proved

(d) A enters into a written contract with B to work certain mines, the property of B upon certain terms. A was induced to do so by a misrepresentation of B’s as to their value. This fact may be proved

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words:—“Bought of A a horse for Rs 500.” B may prove the verbal warranty

(h) A hires lodgings of B, and gives B a card on which is written—“Rooms, Rs 200 a month.” A may prove a verbal agreement that these terms were to include partial board

A hires lodgings
up by an attorney,
A may not prove that

(4) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount A may prove this.

(5) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

Principle. The principle underlying this section is the same as that underlying

single memorial

from scattered parts

sequence of this is that its scattered parts, in their former and incoherent shape, have no longer any legal effect, they are replaced by a single embodiment of the act. In other words, when a legal act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act. *Wigmore* § 2425. So there is a general rule sometimes spoken of as the "oral evidence rule," which declares evidence, the effect of which is to vary the terms of a written instrument, or to change, set down, or alter the effect thereof to be inadmissible. *Mc*

the Courts to defeat this object. When persons express the agreements, in
indefiniteness, and to
understanding, which so
fits. Written contracts

disinclination to disturb the condition of
act of the parties. The general rule, therefore, precludes the introduction of
testimony to show that the parties meant other than they have said in the
writing itself. But it sometimes happens that writings are procured to be
executed by fraud, or do not contain all the agreements between the parties,
having been used only to cover certain matters, while others are left to oral
understanding or there may be other circumstances which make it unjust to

these cases are usually
strictly such. *McKelvey's*

the
writing, it is conclusively presumed between themselves and their privies that
they intended the writing to form a full and final statement of their intentions
and one which should be placed beyond the reach of future controversy by bad
faith or treacherous memory. *Phelp* 1.
Lord Bacon said "The law will not countenance
which is of the higher account, with
account in law" (*Bacon's Maxims*, Reg.
matters in writing made by advice to
import the certain truth of the agreement

1 P. & D. 117, *Davis v. Symond* 1 Cox Cc. 403, sometimes on the doctrine of
estoppel, for in each the party is precluded by his acknowledgment in writing
of what he so acknowledges—in estoppel however it is a matter of

another fact as to where and in what sources and materials are to be found the terms of legal act.

92. *Wigmore* § 2425 *Gulson* also remarks that the rule is one of substantive law directed not against oral evidence as an improper mode of proving the contract, etc., but (1) against such evidence as an improper mode of making it and (2) against extrinsic facts (however proved) being received to affect the meaning of written instrument *Gulson* §§ 418-51; see also *Thayers' Pre Tr Ev.* 401, 17 *Harv L Rev* 240

Scope of the section When the terms of a contract, grant or other disposition of property have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives . . . of the contract, grant . . . of the writing The . . . to be reduced to the fo

In *Pulcring v Douson*, 4 *Taunt* 779, 786, *Gibbs J* said. "I hold that if a man brings me a horse and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens or corrects the representations, and whatever terms are not contained in the (written) contract do not bind the seller, and must be struck out of the case" So "where the whole matter passes in be taken together as forming part and part

can . . . *Abbott C J* in *Kain v Old*, *Knight v Barber*, 16 *M & W* 66, says *Lord Blackburn* in *Angell Dule*, 5 *L R* 1 *Rep N S* 320, "that, where there is a contract in writing, it should not be added to, if the written contract is intended to be the record of all the terms agreed upon between the parties. Where there is a collateral contract, *Wigmore* § 2425

that that writing . . . *sell* 4 *H & N* 1, 7 . . . ere is a deed in deed" *Irisham v* . . . contract, and put it argain." *Per Martin* *ca v Blake*, 13 *M*

etc., is not governed . . . that oral evidence . . . provisions of this sec

"The language of this section is" says *Mr Field* "not quite free from ambiguity, the words No evidence of any oral agreement or statement shall be admitted between the parties to any such instrument, etc., correspond with and have clear reference to the words 'contract, grant, or other disposition of property' in the beginning of the section; but their application to any matter required by law to be reduced to the form of a document required by law to be reduced to writing be a oral statement appears to be admissible the writing in cases other than those inc *Field Ev* 8th *Ed* 501 But according to *Mr* contradiction Section 91 deals with three (1) contract, grant, or any other disposition, been reduced to the form of a document (2) contract grant or any other dis by law to be reduced to such as deposition of reduced to the form, so as to bring it under an act involving

single parties)
contracts,

been reduced to the form of a document by the parties, as well as those bilateral acts which the law requires to be reduced to the form of a contract. Therefore these acts or matters must be contracts, grants or other disposition of property. So this section does not include such matters which the law requires to be reduced to the form of a document which are not contracts, grants or other disposition of property. *Woodroffe v Shil* 611. The deposition of a witness does not fall within this section and oral evidence is admissible to contradict raised by section 80 is only a
v p 611 Section 92 is also

s

act that a
in fact
portion

of the transaction. *Cocle Cas* 310 In *Allen v Paul*, 4 M & M 140, Lord Abinger, C B said 'The general principle is quite true that if there has afterwards reduced by the parties into writing, and to ascertain the terms of the contract, but there was no evidence of any agreement by should be reduced into writing by the defendant, the contract is first concluded by parol and afterwards the paper is drawn up, which appears to have been meant merely as a memorandum of the transaction the om ed of

the document I R 1929 Rang
240 While on written document
by virtue of sec law for the time
being in force, of Act applies that
bar ceases to operate and the Court can make enquiries, that bar of statutory prohibition no longer existing because of section 10 A of that Act *Dada v Bhanu*, 29 Bom L R 1419=105 Ind Crs 754=A I R 1927 Bom 627 This section merely prescribes a rule of evidence. It does not better the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. *Munna v Naram*, 107 Ind Crs 658 See also *Baynath v Hayu Talley*, 26 Bom L R 787=48 M L J 339 (P C) In a suit on promissory note, the defendant can prove a conclusion precedent to the attaching of any obligation by the promissory note was that there should under it unless there was a final balance against the defendant which he failed to pay. *Bhoji v Krishori*, 50 A 754=26 A L J 696 A lessee under a registered lease wanted to prove an oral agreement regarding his preferential right to purchase the leased property if it was brought to sale. The lease was silent on the point. Held that under s 92, evidence of

able to show
Crs 897=
of showing

that one of the parties to the contract had acted as agent is admissible. *Lachomal*
neous oral evidence is
The parties must
interest and compound
interest and if they deliberately have chosen to use one expression they cannot be
u v Ganpati, A I. R 1931
Act it is immaterial whether
subsequent to the disposi-

92. tion *Gopala v Sankara*, 1930 M W. N. 240=125 Ind. Cas 545 In the case of a covenant for title which is presumed to go with a sale under s 55 (27) of the T P Act a contract to the contrary cannot take the shape of an oral agreement since it would be inadmissible in evidence under s. 92 of the Evidence Act *Mahammed Siddiq v* Ind. Cas 165=A I R 1930 deduced to writing no evidence between the parties to show that the document was not to take effect forth with as mentioned in the document but after the expiry of a certain period *Parmesh-nara v Lachman*, 129 Ind Cas 439=A I R 1930 All 824=1930 A L J 1066 In case of a deed of gift by husband to wife the husband can prove that the same is of a fictitious nature *Mahommed v Sayed*, A I R. 1931 Oudh 177=8 O W N 349

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agree

contract and such an agreement can be proved *Irfan Ali v Jogendra*, A. I R 1932 Cal 708=36 C W N 645=59 C 111. Oral evidence is not admissible to prove an agreement between mortgagor and mortgagee whereby a contract in the registered mortgaged bond was split up *Ram Barman v Sanat Kumar*, 25 C L J 24=44 C 162=21 C W N 740 Oral evidence is admissible to show that a mortgagee's possession of a certain plot was terminated by the payment of a certain amount of money *Baid Ram v Tila Ram*, 15 A L J to certain paddy be divided *Held*, section 92, cl (2) of d not been divided 11a, 4 L W 329=34 and so far as the

adjective law is concerned, the code to be followed but also as to the extent

en the

England; and Courts of India are not justness statute law in the same way, as Courts of Equity of common law The effect of section 92 is

it, by proof of an entirely different contemporaneous oral agreement, is not sound *Guyarmal v Sitaram*, 3 N L R 19 An acknowledgment is not a document contemplated in section 92 *Chhedilal v Monohari*, A I R 1930 Nag 298=26 N L R 320.

circumstance that some collection of the terms of a sole memorial of the There may have been an attempt to make the merely to furnish an aid other party's satisfaction

tion. The essential idea remains for it, that the writing is something distinct

from the transaction itself. *Wigmore* § 2429; *Dalson v. Stark*, 4 Esp. 163; *S.*

Parsons v. N. Zealand Co. (1901) 1 K. B. 543; *Phip. Ev.* 555. When the parties during their negotiations reach a final agreement, but provide therein that the terms shall be reduced to a single memorial, the failure to execute such an agreed memorial does not preclude resort to the prior negotiations to ascertain the true terms of the agreement, until supplanted. referring to an

for the parties. *McKelvey's Ev.* § 297.

Partial integration; General test for applying the Rule; Collateral agreement. The most usual controversy arises in case of partial integration, where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form. Here obviously the rule against disputing the terms of the document will be applicable to so much of the transaction as is so embodied, but not to the remainder. It is of course

may within the same half-hour sign articles of incorporation, authorize an overdraft, assign a mortgage and join in a committee's report to stockholders. Or a purchaser of land, negotiating with a broker, may at the same sitting accept a deed of grant of one piece of land and appoint the broker his agent in the purchase of another piece of land. These are clearly distinct, wholly distinct, and wholly distinct instances in which a negotiation concerns one general subject—such as the purchase of a single

"parts" of the same transaction, and therefore, if reduced to writing at all, must be governed by the same writing. In searching for a general test for

92,

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The doc

be known that we know what there was to cover. The one is not to be known

now, such probably the writing was not intended for the negotiation. *Wigmore* § 2430. In *Webb v. Balyby J* said "Where there is a written agreement naturally to be expected that it will contain all if it is entirely silent as to the terms of granting the country as to that particular. If, however, it specifies any of those terms we must then go by the lease alone." *Dickson v. Zuzima*, 10 C. B. 602, 610. Where the writing covers only part of the transactions between the parties and there are oral agreements relating to the same subject, such agreements may be shown. If it appears that the parties did not intend the writing to embody all the transactions between them, the rule is that such transactions as do not purport to be covered by the document, but which supplement or complete it, may be proved. Here, again, there is no varying of the terms of a written instrument. It is only to be used to cover exception subsequent to the writing, as in *Hobbs v. Lord* and *Lord* inference may be drawn from the fact that the parties did not intend by that deed to know the terms of a deed and satisfied by those means but the part to the terms which, though not included in it, there is no reason why he

was used for the purpose of adding to a deed a stipulation to which the parties did not intend by that deed to know the terms of a deed and satisfied by those means but the part to the terms which, though not included in it, there is no reason why he

that where no collateral agreement is shown, it is also held that the collateral oral agreement must have an independent consideration in order to be admissible. *Coe v. Hobbey*, 72 N. Y. 141. As a principle of the law of contracts, it would seem that no collateral agreement would be of any effect in modifying the original unless there was a consideration to support it, and these decisions are therefore strictly logical. *Mc Keehey's Ex* § 296.

Parol evidence rule—Nature of. Notwithstanding the phraseology generally employed in the cases relating to what is called the "Parol Evidence"

of them illustrate anything in the law
cerned with questions about the legal effect
the law, of requiring or agreeing upon a
writing, or with the principles governing the construction of documents or the
like; and not with merely evidential quality or operation of extrinsic facts, or
any rules of law relating to these. As when it is said that parol evidence is not
admissible
any other
reason
is of it

in the other. *Thayer*
Cas. Et. 2nd Ed. 820.

As between the parties to the suit
were not the parties to the contract, is
testimony for the purpose of including parol
contract, is

of others *Greenl. Ev.* § 279. *Holt v. Collyer*, L. R. 16 Ch. D 718; *Chemical E.*

stranger to it, either party may show that the instrument does not speak the
truth, and that the general rule does not apply as it does in cases where the
controversy arise between the parties to an instrument which they have made
the written memorial of their agreement *Venable v. Thompson*, 11 Ala. 147;
Pawel v. Young, 51 Ala 518. *Burr Jones* § 44c

by the statutory restrictions
22 C W N. 257 (262) = 45 C. 320;
A. L. R 1929 R. 86; *Annada v.*
4 N. L. R. 115; see also *Jagat*
Panchoo, 28 A. 473 = 3 A. L. J.
meundar v. Collector of Gorakhh-
1930

2. the terms of a contract which have been reduced to the form of a document "as between the parties to any such instrument or their representatives in interest." In the case of 10 A 421 the words quoted above were construed as meaning between the parties to the instrument on both sides and not on one side only as between t

92; but it
the instrum
Pokai Gun
Madho, 10 A
Srinivasa, 1
the parties t

not prevent the proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person, who was not a party to the conveyance. *Maung Aun v Ma Shue La*, (1911) 2 M W N 30=14 C L J 276 (P. C.)=13 Bom L R 797=1 A L J 1181. Sale deeds and mortgage deeds are essentially transactions

mortgagee
transaction
settlement b

that they agree to make provisions for certain relations or dependants does not make such persons parties to the instrument and oral evidence given by a person concerning maintenance allowance to

cannot be excluded by reason of section 92,
Kua
partie
ve" documents between the contracting
parties. *Modiah v Vaidya*, 9 Mys L J 203

Section 92 limits its operation to cases where the issue as to the real nature of the written transaction arises between the parties thereto or their privies. It leaves out cases of strangers to the instrument wishing to adduce extrinsic evidence in order to prove that the real transaction was different from what it purports to be. *Saboji v Anand Singh*, 101 Ind Cas 736; *Mahomed Sultan Mohideen v Anthul*, 101 Ind Cas 603=52 M L J 557, *Ma Mi v Maung Aung*, 111 Ind Cas 832=A I R 1928 Rang 244, *Mahomed Ishaq v. Fahemunnissa*, A I R 1928 Oudh 472=5 O W N 825, *Maung Thein v. Maung Pyn* 3 Rang 836=108 Ind Cas 734=A I R 1928 Rang 61, *Narra v. Koganti*, (1925) M W N 214=87 Ind Cas 246=A I R 1925 Mad 775=48 M L J 260; *Hiraji v Vishnu*, 1923 Bom 429, *Bhullan v Kushi*, 21 A L J 932; *Jaram v. Rajnarain*, 20 A L J 777, *Sukumarsi v Kalipada*, 45 Ind Cas 13. If a father

be between the nominal purchaser and the vendor, and in cases of dispute between the nominal and the real purchaser, there being no writing between them, no difficulty can arise, under this section, in proving oral agreement. *Laxmitai v Keshav*, 18 Bom L R 134=33 Ind. Cas 396; see also *Pathammal*

statement is admissible in such proceeding for the purpose of contradicting

mortgagor was placed in possession of a part of the mortgaged premises, the income whereof was sufficient to wipe out the annual debt. *Held* that as the arrangement was not in supercession or even variation of the mortgage, oral evidence was admissible to prove the transaction. *Ramachar v Tuls Prasad*, 14 C L J. 507. The liability undertaken by the drawer and the acceptor of a bill of exchange is in different ways and are of section 132 of the preclude the acceptor of a bill from proving that he never received any consideration for the bill but that he accepted it only for accommodating the drawer or some other party. *Pagose v The Bank of Bengal*, 3 C. 174.

Extrinsic evidence to control document is inadmissible. Evidence of oral agreement between the parties to a written and registered document, distinctly adding to its terms, another term which had been antecedently agreed

the defendants sought to show that the written contract was varied by adducing parol evidence as to the matter on which the document was silent. *Held* that such evidence was not admissible under section 92 of the Evidence Act. *Jadu Ras v Bhubotaran*, 17 C 173. The executants of bond as principals, are not competent to

Saing v Nga Lu Aun

bond are clear and

it was an assignment.

oral evidence of intention is not inadmissible

deed or ascertaining the intention of the parties

L R 523-22 A 149-4 C W N 153

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as to the consent of the donee of the life estate to such an arrangement. *Held*, that such oral evidence was clearly inadmissible. *Nabooma v Khedar Hussain*, 108 Ind Cas 637-A I R 1928 Mad 618. Contemporaneous oral agreement not to charge compound interest though bond may stipulate therefor and the fact of simple interest only being realised cannot entitle a party to vary effect of written contract. *Abdul Aziz v Amanmu*, A I R 1925 Cal 276. Evidence of conduct of parties is inadmissible to contradict an unambiguous grant, *Gopal v Ramadhar Singh*, A I R 1925 Pat 228, see also *Kesho v Thakur*, A I R 192

person under

deed and or

this section

oral agreement

till he got possession of the entire property is inconsistent with the terms of the

deed it is not open to the executants to set up and prove an agreement that the rate of interest to be charged was lower than that agreed upon. *Sukh Lal v*

2. *Murari*, 95 Ind Cas 1019=A. I. R 1926 Oudh. 273 Evidence of subsequent oral agreement not to charge compound interest is inadmissible to vary the original contract which is a registered one *Jogendra Nath v. Khoda Baksh*, 1924 Cal 380, *Abdul Aziz v. Amanmal*, 78 Ind Cas 742=1925 Cal 276 An entry in certain account books evidenced a contract to sell goods and they were described as arriving by a certain ship *Held* that oral evidence cannot be let in to show that there was an agreement to deliver goods within a fixed time *Firm of Juwango v. Firm of Mathabari*, A I R 1924 Sind 127

In a suit on a joint and several promissory note payable on demand executed by A and B A creditor as security for B's oral agreement with C under the note in the

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formed the foundation of the suit formed a completed contract, whilst the defendant vendor urged that it was only a provisional arrangement conditional to the preparation by a vakil of a formal document evidencing the contract *held* oral evidence to show what actually took place on the occasion when the parties entered into the agreement relied upon by the plaintiff is irrelevant and inadmissible *Harichand v. Gouind* 44 M L J 608=47 B 335=28 C W N. 73=50 I A 25=37 C L J 440=(1923) P C 47. Where the terms of an

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Evidence of an oral agreement substituting a new executory contract in lieu of a decree is inadmissible *Lachmi Das v. Babakali*, 44 A 258=20 A L J 65=69 Ind Cas 990 It is not permissible to a person who wishes to impeach a

L R 239=66 Ind Cas 865 Where a promissory note is sought to be enforced according to its tenor, it is not open to the defendants, to let in evidence an alleged

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it by way of security for others cannot be tried or determined except so far as it affects the question of consideration *Durgacharan v Laksh Naram*, 47 Ind Cas 917. In a suit to recover possession of the properties conveyed under a sale deed, evidence was adduced to show that the parties to the document intended to give simple mortgage rights to the alleged purchaser for the sum which one had promised to pay to the creditors of the other party. *Held* that such oral evidence is clearly inadmissible to prove that a different mode of operation was

the express terms of the promissory note be proved *Muthu Chulappa v*
the express terms of the promissory note be proved Muthu Chulappa v
the express terms of the promissory note be proved Muthu Chulappa v

and it was sought to
 recited *held* that such
 tion *Narra Reddiar v*
 -3 L W 589-35 Ind.

Cas 801

Where the terms of the mortgage contract are reduced as required by law to writing, an oral agreement varying those terms can not be admitted in evidence *Muthu Kumar v Govinda*, A I R 1932 Mad 218-35 M L W 145 where according to the terms of the registered mortgage deed the whole of the mortgage money is payable on demand with interest, evidence of a contemporaneous oral agreement between the parties that the amount would not be payable on demand but shall be accepted on instalments, is inadmissible under the express provisions of s 92 *Mohammad v Kishori*, A I R 1932 All 375-1932 A L J 414. But when a mortgage bond is silent as to how the money due on it is to be paid and the mortgagee executes a *list bandi* which merely provides that mortgagor is to pay the amount then due in certain instalments spread over a certain number of years with a proviso that in default of any *list* the entire amount under the mortgage bond would become due, the *list bandi*, shows the arrangement between the parties and does not alter or vary the terms of the mortgage bond and it is *Ram*, A I R 1932 Ca provided that each one of

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 Section 92
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raised, and any length of payment of a lesser rent will not help the tenant, *Maharaja of Bobbili v Appala Naidu*, (1916) M W. N 139-32 Ind Cas 703. Where in a suit by the payee of a Hundi against the drawer and the acceptor, the Hundi is silent as to interest, the plaintiff is entitled only to 6 per cent

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Evidence of a contem-
not admissible under
1 Pat L J. 71=35 Ind
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of the deed :

Muhammad

party to a written contract to prove a contract the terms of which are clearly
inconsistent with terms of the written contract *Baranashi v Lulla Mal*, 29 Ind
Cas 950

Where a promissory note executed by defendants 1 and 2 contained an
uncon- is not admis-
sible to be conditional
on the variation of the
contract clearly forbids
evidence ble exceptions
to the *Narasimma*
v Rav 336=18 Ind
Cas 696

Where the subject matter of an appeal is compromised by the parties
by means of a written agreement, which recited that "all matters in dispute"
was adjusted, it is not open to any of the parties to tender oral evidence of a
separate agreement not

therein as 400 bighas

was not the stated area within the specified boundaries Extrinsic evidence as
to the negotiations which led up to
construction of the lease *Raja Durga*
N 66=19 C L J 95=11 A L J

sale deed recites as consideration a cash
contract that the amount was really

of the sale price is a term of the contract within the meaning of section 91 of
the Evidence Act Evidence cannot be admitted to vary the provisions of the
condition fixed for the same *Adityam Aiyar*
M W N 847=25 M L J 632=21

to contradict or vary the express and un-
ambiguous terms of a written instrument by reference to preliminary negotia-
tions or previous conversations *Sayid Abdulla v Sayid Basharat*, 17 C. W.
N 233=13 M L T 182=(1913) M W N 131=35 A 48=17 C L J 312=23
M L J 91 (P C)

Oral evidence is not admissible to prove that a document
which in terms is an out an out gift was really meant to be *donatio mortis*
causa Benode Kishore v Ashutosh Mukhopadhyaya 16 C W N 606=14 Ind
Cas 720

Oral evidence to prove that parties to a sale deed, which was duly
executed and registered, subsequently rescinded it by mutual consent, is in-
admissible under section 92 of the Evidence Act *Byrakallu v. Peddula* 15
Ind Cas 282

Oral evidence to show that one of the executants of a note of
hand signed it only as a security and that his liability was only to the extent of
standing as surety for a month is inadmissible under this section *Hareh v*
Bishnu 8 C W N. 101

Neither a contemporaneous oral agreement nor the
subsequent acts and conduct of the parties can be proved under this section to
show that the contract was not intended to be performed *Pandla*

mortgage, it is only agreed to
to be made by the mortgagee to
the season's crop such agree-
as such, would be inadmissible

Act. *Moran v. Mutu Bibee*, 2 C 58 Under this section no oral evidence is admissible to show that certain deeds of sale are not deeds of sale, but deeds of gift. *Rahman v. Elahi Baksh*, 28 C 70 Where the plaintiff in a suit for specific performance of a contract to sell a certain share of a house, set out a written contract, and alleged that, on its having been subsequently discovered that the share was less than it was originally believed to be, the price was reduced by verbal agreement, held that the written contract must be taken as intact save as to the price, and that no evidence could be given by the defendants in contradiction of the other terms of the document. *Brown v. Cutts*, 5 C L R 487 Where a written instrument provides for a joint tenancy and joint contract by all the parties executing it to pay the whole rent of a village without any reference to the quantity of land in the holding of each, oral evidence is not admissible to show that separate specific contracts have been entered into by each of the parties, and it makes no difference that the evidence is put forward as evidence of a custom. *Mr G Lee v Panchananda*, 5 M H C R 135 Defendant was lessee under a joint lease by K and P, co owners of the premises Plaintiff having purchased an undivided moiety from P gave defendant notice to quit the moiety from the termination of the lease and sued for possession The defendant set up an oral agreement giving him an option of renewal of the lease, but it could not be proved as being

S. 9

instrument whose terms are in themselves clear and undoubted. *Rambuddin v. Rames Sree Koonwar*, W R 1864 Act X Rul 22 Bought and sold notes together may form the contract in accordance with the custom of merchants in Calcutta So, parol evidence was not admissible to vary or add to the terms

of rent of a holding held under a registered lease, nor in the conduct of the leaseable to prove the *habuhyat* was granted partly in cash, and in kind was not duly *um* Held that oral evidence agreed to pay the price of the paddy at the current market rate, and not at the rate specified in the *habuhyat*, upon failure to deliver it duly. *Godas v Sarju*, 12 C L J 649-7 Ind Cas 842

The Writing is really not the contract in writing, which purports to

contract, may be produced, it is still

92. Cas 929, see also Woodroffe's Evidence 5th Ed p 613 But in a recent Allahabad case *Ashworth J* said - "The Appellant's counsel has referred to the following dictum in Woodroffe and Amir Ali's well known commentary, the Indian Evidence Act 'Though evidence to vary the terms of an agreement in writing is not admissible' In support of this, the counsel has relied upon *Harris v. Rick* namely, *Harris v. Rick*, 6 El & Bl 370=25 L the dictum was stated

92 of Evidence Act. There is no authority for holding that evidence in any shape can be admitted for the purpose of showing that there was agreement at all or in other words, that a deed was meant to be inoperative" *Lachmandas v Ramprasad*, 49 A 680=A I R 1927 All 422 (424)=100 Ind Cas 1029=25 A L J 349, see also *Gujar Mal v Sitaran*, 3 N L R 19.

Cases where the oral evidence is admissible "The cases in which oral evidence when objected to is apart from fraud or mistake receivable to correct written instruments are cases where, for example, the evidence supplements but does not contradict the terms of the deed; or where the provisions of the deed leave the question doubtful whether merely a mortgage and not out and out sale was intended, or where the language sought to be explained in evidence is language in an ordinary conveyancing form not exhaustively accurate but

Instances of each of these will be found in *Jurion v Personal* *Trang Chuen v Li Po Kicat*, A I R 19 Where there was a mortgage by which a fixed rate of interest was agreed to be paid, and there was a contemporaneous oral agreement that the mortgagee should go into and be was reement.

written agreement, that it was merely a provision as to how the interest should be paid and that therefore the oral agreement was valid *Brundaban v Unrao*, A W N 1887, 61 In a suit for money due on a promissory note payable on demand the defendant pleaded a contemporaneous agreement in writing allowing

agreed not to be executed against the judgment-debtors is not inadmissible by reason of the section *Ganga v Ram Oudh*, 113 Ind Cas 760=A I R 1921

the joint C) Oral which the under the settlement and future idence which shows that two documents executed and registered on the same day are

... to leading evidence so as
v Ramlal, 25 A L J 723-103
 oral agreement providing for
 repayment of a mortgage debt from the usufruct of the mortgaged property
 may be proved. Such an arrangement does not amount to a lease nor does it
 constitute an usufructuary mortgage. It is only a means of discharging the
 debt by putting the simple mortgagee in possession of the mortgaged property.
Nookamma v Dharmayya 53 M. L J 863 This section prohibits only the
 proof of any contemporaneous oral agreement between the parties in variance
 of the terms of the document. Where the father purchased certain properties
 and took a sale deed in joint names of his two minor sons and subsequently the
 individual share of each of the vendees was sought to be proved by evidence
 relating to the intention of the father. *Held* that section 92 of the Evidence Act
 was not a bar to the admissibility of such evidence as the sale-deed was silent
 regarding the share of two vendees. *Mohammed v Anthul*, 101 Ind Cas
 653-52 M L J 557-38 M L T (H C 247) In the case of an outright sale
 by registered deed, an independent contract to re-sell either orally by un-
 registered deed can be proved, but where the contract is not an independent
 transaction but forms part and parcel of the original transaction and together
 constitutes a mortgage, such contract cannot be proved. If the facts

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 deed is one of an outright
Ma Nan v U Yang, 8 Bur.

314 There is nothing to
 prevent the parties from entering into an oral agreement for the settlement
 of decrees for money. They have the same freedom to do so as to make narrative
 of contract by an oral agreement modifying the previous written contract so
 long as the contract is not required to be in writing and registered. It cannot
 be said that the judgment debtor selling upon a verbal agreement by the decree-
 holder to accept some variations is
 Evidence Act. *Ma Shue v Mang San*,
 Oral evidence to prove that the def
 plaintiff on the understanding that it sh
 when the liability arise upon his part to restore to the plaintiff his share of the
 capital is inadmissible. *Sheo Prasad v Gobind* 49 A 464-100 Ind Cas 332-
 25 A L J 305 A I R 1927 All 292 This section is no bar to the admission
 of oral evidence of circumstances to show the relation of the written language

out of the rents for a certain charity, to pay also the cost and credit the
 balance of the rents towards the mortgage debt. The plaintiffs alleged that
 the defendant failed to pay the said sum of Rs 200 and the cost and that
 the mortgage debt had been
 admissible and that section
 case because it was not oral
 mortgage deed at all. *Ram*
 85-107 Ind Cas 808-A I
 that the amount of Rs 500
 menssem." The question was whether interest should be at one rupee per
 menssem or only one rupee for Rs 500 per menssem. *Held* that oral evidence was
 admissible to prove that the parties intended that interest should be paid at
 1 rupee per cent per menssem, under proviso 1 to section 92 of the Evidence Act.
Venkataramappa v Rama Setty, 3 Mys L. W 146 Oral evidence is admis-

2. sible to prove a discharge and satisfaction of a mortgage bond *Krishnaji v Kashirao*, 90 Ind Cas 459 A recital on a sale deed that there is no incumbrance or that the vendor has a good title to convey is not one of the terms of

succeeded to the estate of their father made an oral partition of the same and also arranged orally to extinguish their mutual rights of survivorship It appeared from the evidence that two lists had been drawn up of the properties as divided and mention was made in those of the right of survivorship having been extinguished The lists were not produced but oral evidence was let in regarding the same *Held* section 92 of the Evidence Act did not apply and the oral evidence was admissible *Delakanta v Sundarasinga Rao*, 48 M 933=22 L W 398=(1923) M W N 643=A I R 1925 Mid 1267=49 M L J 266

Even where an agreement is silent as to the consideration under this section oral evidence is admissible to determine what the consideration was *Pameshwar das v Neu Jooria*, 91 Ind Cas 371=A I R 1926 Sind 202 This section has no application where evidence of the conduct of the parties and their rights of the various members is let in to prove partition by the defendant in a suit *Ramuchetti v Panchammal* 92 Ind Cas 1028=A I R 1926 Mad 407 Where a promissory note is executed by two persons, oral evidence is admissible

rely for the other *Moolji v*
This section does not prohibit
recharge of a debt secured by a
710=96 Ind Cas 11=A. I R

1926 Cal 906

by the release to

Mahim v Ram

suit it is open to the mortgagor to prove that the mortgagee had been satisfied not merely by payment in full of the amount which was due thereon but by part payment and remission of the balance *Bhaba Sundari v Ramkamat* 41 C L J 269=A I R 1927 Cal 27 See also *Ramchandra v Kailash*, 1931 Cal 667=58 C 532 An oral agreement between the lessor and the lessee that the lessor should give credit for certain sums for having cut certain trees is admissible as the transaction is a mode of payment or a discharge or waiver of a portion

Cas 169=24 A L J

evidences a contract

terms is admissible

a suit on a bond the

is offered to show that the money due under the bond was meant to be the premium for a lease agreed to be executed by the creditor but which in fact was never executed, *held* that the evidence was excluded by section 92 of the Evidence Act. *Baldeo v Ram Autor*, 22 A. L. J 850=82 Ind Cas 347 Where all the terms of a contract have not

admissible to prove the terms not

Coalfields of Burma v H H Johnson

Rang 128 Where a date is fixed in the

oral evidence to extend the period is

terms of the contract so as to make it

76 Ind Cas 62 Where a promissory note is endorsed on the back by a person who is neither the maker nor the holder, oral evidence can be let in to prove a contract of guarantee *Thakarsay v Kishendas*, 76 Ind Cas 292=1925 Sind 9

agreement between the mortgagee and
of redemption as regards the terms on
assign his interest *Sailesh Chander v*
oral evidence is admissible to prove a debt

acknowledged in writing by the debtors when such acknowledged writing being
unstamped is inadmissible in evidence *Thalhan Rim v Lall*, 74 Ind Cas 939=

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evidence of a contemporaneous oral agreement to the effect that the

agreed to treat it as a mortgage is admissible. *Talak Chand v Almatam*, 25 Bom L R 818-A I. R 1924 Bom 58 Oral evidence is admissible as to negotiations antecedent to execution of the mortgage instrument, showing that what was intended to be offered and accepted as security was a certain ancestral share.

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239-64 Ind Cas 33 Where an

oral agreement is made, which in respect of the manner of payment rescinds or required by law to be in payment if made in accord- partial satisfaction of the not exclude evidence of the payment or the oral agreement that explains it It does, however, exclude evidence of the agreement in respect of future payments not in accordance

L J 387-18 A L J 359-55 Ind. Cas 522-47 I A 17 (P. C) Where in agreement for the sale of land, it was impossible to reconcile the statement in the body of the agreement with the recital in the schedule as to the extent of the land to be conveyed, extrinsic parol evidence is admissible to explain the facts that led to the execution of the agreement, in order to reconcile the different statements regarding the property sold. *Hussonally v Mangoldas*, (1920) M W N 728 (P C) There is nothing in this section to exclude evidence of an oral agreement which contradicts, varies, adds to, or subtracts from not the terms of the contract, but some recitals in the contract itself, *Mukhi Singh v Kishun*, 51 Ind Cas 320 Where there is an oral agreement to grant a lease section 92 of the Evidence Act does not stand in the way of proof that there has been an agreement under the circumstances as to the time of the

Chandra v Bijoy Kanta, 23 C W

Kabuliyat executed and registered by a tenant is proved by the tenant in a suit there is nothing in the Evidence Act to prohibit the landlord from showing that he never assented to or accepted the *Kabuliyat Hemanta v Birendra*, 47 Ind Cas 1003 Oral evidence of a sale by the mortgagor to the mortgagee

consideration that has passed, by showing that the actual consideration was something different to that alleged *Vashudeta v Narasamma*, 5 M 6; *Dookha v Ramlal*, 7 W. R. 100. *Indanyit v. Lalchand*, 1 Bomaya Nalk v. Tir. rent is admitted by the lessee, the lessee can rely on it. This section does not affect the case *Satyesh Chunder v. Dhunpul*, 24 C 20. Where the plaintiff executed a mortgage instrument to the defendant and the consideration recited therein was that the defendant was to pay certain debts, and the instrument was not signed by the defendant nor was there any promise by the defendant to pay the debts, the instrument, does not c tendered which samu, 7 M 19 entered into between the parties, when some others have been reduced into writing in letters exchanged between the parties *Ambika v Gaultstain*, 13 C W N 326 and not a sale—the question being regarded as purely one of intention *Ismail v Hafiz*, 10 C W N 570 (P C) = 3 A L J 353 = 33 C 773. Section 92 of the Evidence Act, only enacts that oral evidence cannot be given to vary or contradict the express terms of a document and does not prevent a party from giving evidence to prove that certain persons caused the document to be executed in favour of certain others mentioned in the document *Shail Muhammad v Ram Dutt*, 5 P R 1896, see also *Tani Mahesha v Secretary of State*, 67 P. R 1894. Liabili upon rescinc a case 1903 and re able from any oral agreement to vary the terms of mortgage contract and can be proved without the evidence of such agreement *Suppanchett v. Yegnarayan*, A I R 1932 Mad 141.

Evidence of conduct or intention for varying, contradicting etc. The acts and conduct of the parties can only be proof either (1) of a contemporaneous oral agreement varying the terms of the registered contract, or (2) of a subsequent oral agreement having the same effect. In the former case the evidence

tional sales, which it has always been permitted to be shown to be mortgages. As pointed out in *Rahman v Elahi Baksh*, 28 C 70 such cases are admitted. But the plea of the

question was *Banerjee*, 5 Full Bench

was really varied by a verbal promise to reconvey on repayment of money, making it in fact a mortgage." In answering the question in the negative

2. Peacock C J representing the views of the majority of the Full Bench said "I am of opinion that verbal evidence is not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import. If a party executes to another a written instrument containing certain terms, he cannot afterwards prove by oral evidence that he intended to say something different from what he has put down in writing." Both parties

and that he was never possibly one
or follow the absolute bill of sale,
transaction -- therefore, becomes material
to try what , and forcibly dispossessed a -
alleged by h , the amount of the alleged
purchase money advanced, and to the value of the interest alleged to be sold,
and the acts and conduct of the parties, they intended to act upon the deed

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There can in no case be written instrument, could be between the parties by any understanding or

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Nith, 23 W R 167; see also *Madhab Chandra v Gangadhar*, 11 W R 450 = 3 B L R A C 83. In *Peacock C J* 300 = 4 C L R 419 it was held that in *Kashi Nath v Chan* *Hecra Lal*, 3 C L R 50. What is the effect of this section on the Full Bench case was again considered in *Hem Chandra v Kali Charan Das*, 9 C 523. There *Garth C J* for the Court consisting of *Garth C J* and *Millet J* observed: "It has now been argued that the principle established in the Full Bench case was passed in 1872,"

ground for supposing, that the Full Bench case is not law at the present day, so entered the law. It is a rule which has been made, or intended to make, any prevailed here before the Act was in the Full Bench case, I should consider that our proper course was to refer the question to another Full Bench; but who seems to rule as

which the judgment in the Full Bench case proceeded in one which, in my opinion, is perfectly consistent with that rule. It is a principle which has constantly been England, as well as by the

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the present. *Turner L J* has brought an action of ejectment against *Lincoln* to recover certain land, which the latter had conveyed to him by a deed, which appeared on the face of it to be an absolute conveyance. *Lincoln* then brought a suit in equity to restrain the ejectment, on the ground that the transaction was in reality a mortgage, and he relied in support of that contention, partly upon a parol agreement, and partly upon the acts and conduct of parties. *Turner L J* says "The principle of the Court is that the Statute of Frauds

9 C 898

So although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties, and if it clearly appears from such conduct that the apparent vendee

2. real intention and purpose of the parties at the time : The exercise of this remedial jurisdiction by the Courts of India exercising a similar jurisdiction covers the whole of the section does not say that, in order to constitute an estoppel, the acts which a

which was one of the grounds for calling 'past performance' But the ground upon which it is safely be rested, Courts will not allow a rule or even a statute, which was passed to suppress fraud, to be the most effectual encouragement to it and accordingly in England the Courts for common law have the same rule as the Indian Evidence Act and 92 of the Act, the Legislature, Specific Relief Act

Indian Evidence Act so as to bring them into conformity with the practice of the English Courts of Chancery *Balshu Lal sultan v Gourinda*, 4 B 594 So the principle of law laid down in the *Churn*, 5 W R 68 was approved or *Pheloo v Geerish*, 8 W R 515; *Ha Sheikh Parabal v Sheikh Mohammed*, 1 B L R A C 87; *Behary v Tej naran*, 10 C 764, *Nundo v Prosunno*, 19 W R 333, *Bholanath v Kaliprasad*, 8 B L R 89, *Venkataramnam v. Reddiah* 13 M 494, *Rahien v Alageppu dayan*, 16 M 80, *Kader v Nepean*, 21 I A 96-21 C 892 (P. C.) also *Balkishen Das v Legge*, 19 A 434, *Holmes v Mathews*, 9 Moo P C 419, *Mutty v Annundo*, 5 M I A 72, *Barton v Bank of New South Wales*, L R 15 App Cas 379 The question was again considered by a Full Bench of the Calcutta High Court in *Prionath Sha v Madhusudan Bhuiya*, 2 C W N 562-25 C 603 (F B) There *Banerjee* and *Watkins JJ*, in their order of reference reviewed all the previous cases on the subject *Maclean C J* in delivering the judgment of the Full Bench observed "In regard to the question of law, which was the main ground for this reference, namely, whether oral evidence as to acts and conduct of the parties was admissible to prove that the deed in this case was intended to operate as a mortgage and not as an out and out sale, the learned *vakil* who appeared for the Appellant stated that having regard to the authorities he could not succeed in contending that such evidence was not

oda Balsh, 26 In Cas 717

v Legge, 4 C W N 153 (P C) =
y Council In that case the question was

whether certain deeds executed by the respondent in favour of the appellants constituted a mortgage transaction or an out and out sale with a contract of repurchase *Lord Dary* in holding that oral evidence of intention was not admissible for the purpose of construing the deeds or ascertaining the intention of the parties, said, "By section 92 of the Indian Evidence Act (I of 1872) no evidence of any oral agreement or statement can be admitted, as between the parties to such instrument or their representatives in interest, for the purpose of varying, or adding to, or subtracting from, its terms, subject to the exceptions contained in several provisions It was conceded that this case could not be brought within any of them The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not in the opinion of their Lordships any application to the law of India as laid down in

the Acts of the Indian Legislature. The cases must therefore be decided on the S. 9

of the parties, that is, evidence of the repayment of the money, the return of the deed and the exercise of the acts of possession by the vendor, and not of the acts of the parties. If that was the view of the parties, the view we take is supported by a full Bench decision of this Court in the case of *Preo Nath v Madhu Sudan*, 2 C W N 562=25 C 603. It was contended by the learned J. for the appellant that the decision must be taken to have been in effect overruled by the decision of the Privy Council in the case of *Balkishen v Legge*, 27 I A. 53=4 C W N 153. We do not consider the argument sound. The evidence that their Lordships considered inadmissible in the case just referred to was certain oral evidence of intention which had been admitted in the Courts below and the ground upon which their decision is based is that such evidence is excluded by section 92 of the Evidence Act. Their Lordships

evidence of the acts and conduct of the parties not being in the nature of an oral agreement or statement." See also *Mahomed Ali v Mst Nazar Ali*, 5 C W N 826=28 C 289; *Ali Sherkh v Imam Ali*, 35 Ind Cas 102; *Miriam v Ibrahim*, 28 C L J 306=48 Ind Cas 561; *Kamala v Nandan*, 11 C L J. 39, *Ramavatar v Tulsi*, 16 C W N 137, *Sharadi v Jamal*, 17 C W N. 1053. In the last named case B executed in favour of A a deed of out and out sale with a condition of re-purchase of a house but no date was fixed for the repurchase. On the same date B executed a *kabulyat* in favour of A by which he accepted a lease of the housesold. The Court took into consideration how the language of the document was related to the existing facts such as that the vendor continued in possession, paid rent at the usual rate of interest, etc., and further that the value of the property was much more than the consideration paid. In delivering the judgment *Jenkins C J* said "The argument before us has been that it was not open to the Appellate Court to regard the transaction as a mortgage. I designedly use the word 'transaction' because that with which we have to deal is not contained in one document but in two, and what we have to consider, in the circumstances is, whether there is anything in section 92 of the Evidence Act or in *Balkishen v Legge*, 22 A. 149—which is in opposition to that section—that would compel us to hold that the decision of *Mr Justice Chatterjee* is erroneous. We would certainly

in Calcutta. But it appears to me that all these authorities to which allusion has been made are beside the point in this case, for I cannot find that the learned Judge of this Court has relied on any evidence of oral agreement or statement or of intention, with a view to coming to the conclusion at which he arrived. He took the transaction as it is expressed in the documents. He also took into consideration those facts which may legitimately be proved with a

principal document is expressed in qualified terms, and it is only open to the suggestion that it is an out and out sale, if and so far as it can be said that the express terms of the deed must be disregarded.

In *Narendra Lal v Bholanath*, 21 C W N 331=11 Ind Cas 102, cases of *Preonath Shaha v Madhu Sudan*, 25 C 603=2 C W. N 562; *Khanlar Abdur v Ali Hafez*, 23 C 256 and *Mahomed Ali v Najar Ali*, 23 C 280=5 C W N 306 were followed, see also *Kailash Chandra v Darbaria*, 20 C W N 347; *Manindra v Durga Sundari*, 20 C W. N 680; *Arjad Ali v Sheikh*, 50 Ind Cas 12; *M Priyabarta*, 20 C W.

an instrument, only of showing that the transaction is not what it purports to be. *Krishna Lal Sinha v Sri Raj Kuar*, 104 Ind Cas 299=1 Luck C 97=A I R 1927 Oudh 276. *Mariam Bibi v Ibrahim*, 28 C L J 306=48 Ind Cas 561. The rule, that the conduct of the parties in respect to an instrument may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted. *Dejee Trikamjee v Dayamoy*, 103 Ind Cas 418=A I R 1928 Pat 225. Subsequent conduct of

contract were never in the deed to be acted upon from the very beginning. *Narendra v Bholanath*, 77 Ind Cas 154=27 C W. N 336, see also *Ali Sheikh v Iman Ali*, 35 Ind Cas 102.

A different view has been taken by the Bombay High Court in *Dattoo v Ramchandra*, 30 B 119=7 Bom L R 669, where *Jenkins C.J.* said "The plaintiffs sue to recover possession of land alleging that the document passed by his father, though in form an absolute conveyance was intended to operate as a mortgage. The grounds on which their contention is based, are that the consideration was a debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession for until his death, and that after his death his widow remained in possession for

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case in that there was no agreement enforceable by law to sell the property, but that there was a mortgage agreement, it should be specifically determined whether or not the parties as shown by evidence, in a mortgage Bom L R 764 The plaintiff sued in

is not open to
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na v Godigaya,
om L R 684
mortgage dated

1899 The mortgage having been expressed in the form of a sale deed, he
referred to s 10 A of the Indian Agriculturists' Relief Act to show that

words which refer to s 12 of the Evidence Act, and does not point to any
Gopal v Morar, 15 Bom L R
ana, 31 Bom L R 1266, Gopal
The object of s 10 A of the

Bom L R 1200
the case of Ballishen Das v

inference that there was a contemporaneous oral agreement or statement between

2 from, the terms of any contract, grant or disposition of property which has been reduced to writing, and no exception is made in any of the provisions to sect 92 or elsewhere in the Act, in favour of evidence which contradicts the acts and conduct of parties from which an inference might be drawn that there was such an oral agreement to vary the terms of the contract or grant. The question before us is really concluded by the recent decision of the Privy Council in *Balishen Das v Legge*, 27 I A 58=22 A 149. In this connection we may also draw attention to the direction which is drawn by the same tribunal between admissibility of evidence to show that a recital of a fact in a contract or grant is erroneous, and evidence to vary the terms of a contract or grant (*Sri Lal Chand v Indrajit*, 27 I A 93=22 A 370), and also to the decision in the House of Lords in *North Eastern Railway v Lord Hastings*, (1910) A C 200 in which it was held that when the words of a deed were plain and unambiguous, the fact that the parties understood it otherwise and acted on such understanding for a period of more than forty years, could not affect the construction of the instrument and the effect to be given to it. See also *Tenafra v Subramaniam* (1917) M W N 674, *Chall Venkaya v Derajalakum*, 1912 M W N 164. Where the contemporaneous agreement though in writing is not registered, it is not open to the party to show that what is apparently a sale was really a mortgage. *Meenaksh Sundaram v Chinnelu*, 109 Ind. Cas 18=A. I R. 1928 Mad 409. Evidence of subsequent conduct to prove contemporaneous agreement is not admitted. *Fry v Holmes v The Bank of Upper India*, 77 Ind Cas 523=5 Lah L J 439. In delivering the judgment the Court observed "On the question of whether he can be allowed to produce evidence of a contemporaneous oral agreement varying the terms of the written document, the learned senior

very clearly and we find which he comes that this in which the High Courts *Ma Shue*, 44 I. A 236 (P C). It was contended Council has not definitely =114 P L R 1901 A. wed Preonath ankar Abdur the Calcutta s conduct as

by the same way in *Holms v The Bank of anhya Mil*, 15 P W 9 *Bm v. Ma Bang*, 3 J. B R. (1:02-1903) 14 O. C. 321; *Ramesh* 3 R 1903, 3rd Qr Cas. 644, *Sookna v B L R Sup Vol*

399=5 W. R. 76, *Jugobundhoo v Rukee*, W R. (1869) 393; *Mahomed v Raesooden*, 6 W. R. 117, *Radha v Ram*, 9 W R 251; *Bulak v Flad*, 27 P. R 1911=118 P W R. 1911=10 Ind Cas 1004

In *Maung Hym v Ma Shue*, 15 C W N 958=39 I A 146 P. C=21 W L J 1105, the appellants who had acquired certain properties under absolute conveyances subsequently purporting to be a mortgage. In this conveyance of the parties (as distinguished from evidence of oral statements and conversations constituting in themselves an agreement to contradict or vary the written instrument) to show that the transaction was

on this appeal is whether or not that evidence was properly rejected . . . Its object was to show that whatever the terms of the document may have been, none of the parties had acted on them as effecting an absolute sale, but that through a long course of mutual dealings materially affecting their respective positions

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opinion on the construction or application of section 92 of the Indian Evidence Act in relation to the deeds of the 4th March, 1903. That case again went up to the Privy Council (*Vide Maung Aye v Ma Shue La*, 22 C W N 377 P. C. 71). The result of the appeal was that the evidence of oral evidence

Lordships are now in possession of the facts and of concurrent findings upon the most important of them. Upon the non admissibility of the evidence reliance is placed by the respondents upon section 92 of the Indian Evidence

the respondents maintain that the ed On the contrary, the Appellants the section, they are entitled to set the parties as inconsistent with the

transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage. They found upon a considerable body of authority to that effect, the cases cited being, *Balshu Lakshman v Govinda Kanu* 4 B 594; *Hem Chander v Kally Charan*, 9 C 523, *Rakhen v Algappudayan*, 16 M 80, *Preonath v Madhusudan*, 25 C 603=2 C W N 591, *Khanlar v Ali Hafez*, 28 C 256 and *Mahomed Ali v Narai Ali*, 28 C 289=5 C W N 326. The judgment of Mr Justice Melville in the first of these cases is repeatedly founded upon in the course of the series, in which the learned Judges expressly followed the English equity doctrine as expressed in *Lancolin v Wright*, 4 Deg & J 16 by Lord Justice Turner thus: 'The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between plaintiff and Wright, the transaction should be a mortgage transaction, it is, in the eye of this Court, fraud to insist on the conveyance as being absolute, and oral evidence must be admissible to prove the fraud.' In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Dorey in the case of *Balshu Das v Legg*, 27 I A 58=4 C W N 153. It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of the parties to written documents. Lord Dorey cites section 92 of the Indian Evidence Act, and adds—The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not in the opinion of their

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remains in India. But the respondents rightly refer to *Acuta Rinarani v Subbarani*, 25 M 7, *Maung Bin v Ma Hlaing* 3 L B R 100 and *Dattoo Vali v Ram Chandra*, 30 B 119, and in particular in the judgment of Jenkins C J in the last case. In this the Lord Dorey, has been rightly followed *Annada Chandra*, 71 Ind Cas 336=77 Ind Cas 151. In *Narasimhan v Nandamuri*, 20 C. N. 17 M.

2 729 (P. C.) the question was whether documents executed between the parties constituted a mortgage or a sale. The court held that the documents, with an agreement to reconvey, constituted a mortgage, and not a sale. The court also held that the mortgage was not a sale with a right of redemption.

22 A 149-4 C W. N. 153, are clearly required to show in what manner the language of the document is to be construed.

In *Bairnath Singh v. R. 787*, the suits were instituted by the *Natu Singh Oil Co.* on the footing that certain transactions entered into between the plaintiff and defendant, *Hajee Mahomed Jamal*, were mortgages. The defendant contended that the transactions were, as they purported to be, absolute sale to the original defendant followed by contracts for the resale of the shares to the plaintiff, that time was chase had been extinguished by the transactions. Sir *Balkishen Das v. Legge*, 27 I A 58-23 A 149-4 C W. N. 153, that under section 92 of the Indian Evidence Act, as between the parties to an instrument, oral evidence of intention is admissible.

cribes a rule of

PROVISO (1).

Scope of the proviso. The admissibility of extrinsic parol testimony to

or variation or contradiction of, a written transaction

concerning memorandum,

(4) Fraud, mistake, illegality, incapacity, failure of consideration, or other matter showing that the writing is not the valid transaction it purports to be

(3) Any collateral verbal agreement on the same subject-matter, consistent

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49 A. 680=

Scope of proviso (1)—Parol evidence is admissible to show that a writing is not really the valid transaction which it purports to be. Such evidence may therefore be given to prove fraud mistake, illegality, incapacity, failure of consideration, or other matter affecting the validity of a writing as a document. *Cockle Cas* 341. In *Henkle v Royal Ex Ass. Co*, 1 Ves 317, Lord Hardwicke said, "No doubt, but this Court has jurisdiction to relieve in respect of a plain

which they put down is final as to what they mean; it is the binding record of the agreement. But they are always at liberty to show whether it is the binding record of the agreement. Suppose that the signature were made in the course of a dramatic representation, or suppose a printed form of agreement were used and the witness had taken down his name in the space meant for the p be at liberty to show the real s. in *Wake v Harrop*, 7 Jur 710; C. *Natt*, (1900) 1 Ch 618, *Dobell v Stephens*, 3 L J K B 89, *Cockle cas* 341 So the first proviso in no way transposes the rule in *Mark Ev* 73 So the rule is nce, under the proper pleading, that it never had any legal of forgery or fraud, or for the due execution and delivery, m, 9 East 421, 422, *Taylor* § 3). In delivering

defence to point out and to claim protection from enquiry contradiction and variance of the terms of which is not in question. In such cases, the Court is not bound by what has been described as a mere paper expressions of the parties and is not precluded from enquiring into the real nature of the transaction between them. The first proviso to that section, therefore, declares that any fact may be proved which would invalidate any

want of due execution or cap. But in my opinion, this is not so, as the instances given are not exhaustive but, as appears from the use of the words 'such as' are set out by way of illustration. Some of the that the the the

2. did not wish to put in writing *Mottayabhan v Palani* (1913) M W N 650-25
 M L J 290-20
 jointly and severally
 he signed only as a
 his signature that he
 in the evidence *Maung Sein v Ma Saw* 3 Bur L J 112-82 Ind C 816
 When a document can be shown to come within proviso (1), evidence of
 contemporaneous oral agreement contradicting the document is admissible
Mahomed v Abdul, 63 Ind Cas 368 Under proviso (1) to s 92 any fact may
 be proved even that there was
 never any I was altogether
 dropped cannot be given
 effect to to the defendant
 in a redemption suit to plead that the mortgage is a fictitious document intended
 to cover a previously
 the first proviso to sec
 invalidate the deed &
 purporting to be a
 standing of both parties that it is not to be treated as the real contract between
 them, is not an agreement enforceable by law, and there is not a contract at all
 and does not acquire the
Muhammad v Cassim Ali L
 property in suit to defend
 a conveyance in consideration of services rendered or to be rendered by defen
 dant No 2 in inducing his master L to sell certain property to the plaintiff
Held that the defendant No 2 was entitled to prove the real transaction by
 oral evidence *Abd Khan v Mussamat Seval* 9 Ind Cas 161-15 C W N
 409 Where a party deliberately and with eyes open executes a deed of sale he can
 not be allowed to set up against it an oral agreement that the sale is a mortgage
 He may prove that a mortgage was intended but that by fraud, mistake or
 otherwise tended to execute
 a sale deed at that the sale
 was to be C P L R 127
 Parties can show that they never came to an agreement or that written contract
 having an uncertain date *Radhakissen*
 v D
 inadmissible for the purpose of
 invalidating a written agreement *Dholan Das v Pritya Singh*, 85 P R 1893
 Under this proviso any fact may be proved which would invalidate any docu
 ment Therefore in a suit on a bond, a defendant
 of = 241, 03 1 R 1832 *Haji*
 a void or a conveyance in an apparent sale deed formed only part of the real
 agreement between the parties, and the oral agreement to re-convey to the
 vendors which gave them a claim to equitable relief formed another part of the
 same transaction, it is in the eye of law a fraud to insist on the conveyance as
 as for proving
 - - - - - dence of the oral
 it would invali
 a in the document as a deed of absolute sale within the meaning of the first
 proviso to the section and constitute a ground for a Court of equity and good
 conscience giving effect to it only as a mortgage *Rallen v Alagappudayam*
 15 M 80 This proviso seems to apply to cases where evidence is admitted to
 show that a contract is void or voidable, or subject to reformation upon the ground
 of fraud or fraud alleged to be
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 20 B 636

It may always be shown that the document in question never had any legal existence. On this ground rests the very important exception that duress or fraud in the inception of the contract may be proved, although accompanied by the

ever
case, to
Waddell
Blanton,
'83; *Phip*

Ev 4th Ed pp 537, 538 If the fraud is clearly proved, one of the essential elements of contract—consent—is wanting. Thus it may be proved by parol evidence that any material part of the contract was fraudulently omitted or inserted by the other party, (*Heter v Glasgow*, 79 Pa 79) or that it was fraudulently misread to one not able to read and that he was thus induced to give his signature; (*Mc Messon v Sherman*, 51 W 303) or that a part of the contract was not reduced to writing because of the fraud of one of the parties, in which case the whole transaction is open to explanation by parol evidence. *Phyfe v Wardell*, 2 Edw Ch (N Y) 47. In brief, if one person fraudulently

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Russ, 16
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in such

motives and intentions that prompted the parties to execute the same. Such evidence is permissible to show fraud in a transaction which, if shown, annuls the contract, and prevents its enforcement. It is not admitted for the purpose of varying the terms of a contract but merely to ascertain whether it is a *bonafide* transaction or sham. If there is no fraud, the contract will stand, conversely, if there is fraud, the purpose of the admission of parol testimony is served. *Fairbanks v Simpson*, 28 S W 128 (Am). In such cases any secret agreement radiating the face of the
nto (*Gray v Hankinson*,

entire transaction may be investigated
brought by one of the contracting pa-

contract should not be impeached or changed, unless it appears that one of the parties was fraudulently misled or deceived. Without enumerating them then,

a certain sum and deliver up a note of the lessee then held by the lessor. The evidence established the facts stated, and the Court said it would be difficult to

S. 92

Undue influence U
Influence, in order to
would make it sufficient to
by coercion or fraud"
at p 45 Similarly *Parl*
observed: "Undue influ

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Illegality The c
it is forbidden by law, c
the provisions of any
person or property of another, or the Court regards it as immoral, or opposed
to public policy In each of these cases, the consideration or object of an
agreement is said to be un

in which it is intended to
Budge Budge Mill, 83 C 702, *Cun Contract Act* p 102 the legality of a
contract has to be determined by the law of the place of performance, or if no
particular place is designated by the law of the place where the contract is
made But the *lex fori* det
be recognised Although ther
the law applicable to it, it
laws expressly prohibit such an agreement Nor will the *lex fori* suffer the
foreign law to be applied, if the agreement is contrary to the interests of the
state or to common principles of justice and morality *Santos v Illidge*, 28
L J C P 317 Accordingly, the Court will not enforce an agreement obtained
by threats of a criminal prosecution although the agreement is valid according
to the law of the country where it was made and where the parties to it were
domiciled *Kaufman v Gerson* (1904) 1 K B 591; *Cun Contract Act* p 103
Illegality covers instruments or transactions against public policy, such as

Ev § 1137 So oral evidence
object or consideration of an
agreement in writing is unlawful and that therefore the agreement is void
Kashi Nath v Brindaban, 10 C. 649, *Anup Chand v Chandra*, 12 II 585; *Dens*
Midhab v Sadasook, 32 C 437 Moreover, when it appears that the transaction

is thus unlawful, it is the right and may be the duty of the Court to take cognizance of the fact although it may not have been pleaded *Fischer v. Kamali Naicker*, 8 M. I. A. 187; *Scott v. Brown*, (1892) Q. B. 724; *Hill v. Clarke*, 27 A. 267, *Con. Contract Act* p. 101. Oral evidence is admissible to show that an agreement in writing to sell Government promissory notes is really an agreement made by way of wager on its market price on a future day *Eshoor Das v. Venkata Subba Ram*, 17 M. 480.

Want of due execution : "Execution" when applied to a document, is the last act or series of acts completion *Bhouany v. De* to the act of completing a by the testator, yet in ordinary the testator and the attestation of his signature *Per Sir A. J. 12 O. L. J. 1 = A. I. R.*

Syed Ali, 12 O. L. J. 1 = A. I. R. with executing a signed document, legal consequences, the act which he adopts and makes his own the general, immaterial whether he has acknowledged it. It is even *Ignored* § 2134. It is in writing, ion, Seal, Attestation. These formalities some of the Acts

as an inherent element of form in the validity of the transaction. *Lake* all other

certain general danger sake of this policy.

the fact that the an unlawful object, is in the suit is brought *Arumengadu v. Maung*

Want of capacity of the contracting parties Parol evidence may also under the proper pleading, be offered to show that the party was incapable of contracting by reason of some legal impediment, such as infancy, coverture, idiocy, insanity, or intoxication *Barret v. Buxton*, 3 Atk. 167. Besides the two classes of persons *non compos mentis*, viz. idiots and lunatics *Lord Coke* mentions two more classes viz., those who were of good and sound memory, but by the visitation of God has lost it, and those who have become *non compos* by their own act, as drunkards (*Will Exor* 25). In the former of these two latter classes must be reckoned those who from sickness, grief, accident or old age *Lord Coke*, as *lunatics* those under has assigned *13; Rigby v.*

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L. J.

From this judgment Chaitram Rambilas appealed

1915

Mr N N Sircar and *Mr H C Mazumdar*, for the appellants, contended that there had been no refusal on the part of the arbitrators to take evidence, and that the respondents had not made the case in their petition that they were ignorant of the rules of the Bengal Chamber of Commerce or that they were not bound by those rules. They referred to the case of the *Ganges Manufacturing Company Ltd, v Indra Chand* (1) in support of their contention that the rules of the Chamber of Commerce were imported into the contract, and they also referred to *Benjamin v Barnett* (2)

CHAITRAM
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v
BRINDI
CHAND
v
JENKINS C J

Mr L P E Pugh and *Mr C C Ghose*, for the respondents. We rely upon two points (a) misconduct, and (b) our ignorance of the rules of the Chamber of Commerce, which are therefore not binding upon us. As to the first point, a refusal to hear evidence is misconduct, see *Russell on Arbitration and Award*, 9th Ed, pp 148, 149. They also referred to *Harrey v. Shelton* (3). With regard to our second point, we cannot be bound by rules of which we are ignorant. *Perry v Barnett* (4)

JENKINS C J This is an appeal from an order of Mr. Justice Imam made apparently under section 11 of the Indian Arbitration Act. There was an arbitration followed by an award. But it is alleged that there was misconduct on the part of the arbitrators; and it is on the ground of this misconduct that the application was made to the Court and succeeded before the learned Judge. The misconduct suggested was the failure to hear evidence. Whether there was that failure or not is a matter in dispute.

(1) (1906) I L R 33 Cal 1169

(2) (1903) 8 Com Cas 244 247

(3) (1844) 7 Bar 47, 412

(4) (1897) 1 Q B D 394

1915

CHAITRAM
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BRIDHI-
CHAND
KESRICHAND
—
INDIAN C J

But the way in which the case was presented to the learned Judge and in which he understood it appears from this passage in the judgment: "The petitioners' complaint is that the arbitrators refused to allow them to adduce evidence to establish their contentions and proceeded with the arbitration according to the Rules of the Tribunal of Arbitration established by the Bengal Chamber of Commerce and not according to the law under the Indian Arbitration Act. The petitioners' contention is that the arbitration clause in the contract is merely an agreement to abide by the decision of the Chamber without accepting to be governed by the wide powers of that body as expressed in their rules." It is apparent therefore from this that it was admitted that the misconduct depended upon the alleged non-applicability of the rules governing an arbitration by the Bengal Chamber of Commerce. I cannot attribute any other meaning to the words of the judgment which I have just quoted.

The first question, therefore, which we have to consider is whether these rules were imported into the contract. Even without the assistance of any authority it appears to me that these rules were imported into the contract and that without such importation the contract would be insensible so far as it related to arbitration. For, it would involve the ridiculous position that every member of the Chamber of Commerce would have to sit on the arbitration. So that on the contract itself I should have felt no doubt. But apart from that there is a very careful judgment of Mr. Justice Harington in *Ganges Manufacturing Co., Ltd., v. Indra Chand* (1), delivered as far back as the 5th June 1906, where the contract was in the same terms as that with which we are now concerned

The learned Judge came to the conclusion which I have indicated as a correct view of the contract. That decision was certainly binding on the learned Judge and according to my opinion, should have been followed by him. It may not be binding on us in the strict sense. But I think it is entitled to every respect and it agrees with the view I entertain on the subject.

Therefore it appears to me that on the basis on which this case was argued and conducted before Mr Justice Imam there was no misconduct, because the rules of the Chamber of Commerce were applicable.

It appears to us unnecessary to consider other matters. But I cannot refrain from pointing to the fact that the application, verified and supported in the way it is, forms a most unsatisfactory basis on which to claim relief under section 14 of the Indian Arbitration Act. It is so unsatisfactory that I do not think that there should be a remand. In my opinion the appeal should be allowed and the application dismissed. The respondent should pay the costs of the hearing before Mr Justice Imam and before this Court.

WOODROFF, J. I agree that the appeal should be allowed. The fact that the Chamber of Commerce has framed rules for its arbitration is, I should have thought, well known to every trader in Calcutta, particularly to those accepting contracts stipulating for arbitration by the Chamber of Commerce. However this may be, I entirely agree with the judgment of Mr Justice Harrington in the case referred to by the Chief Justice that if a party to a contract has agreed to submit to an arbitration of the Bengal Chamber of

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KESRICHAND.
JENKINS C. J.

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CHATTOP-
PACHARY
J
BIDDI
CHAND
KESRICHAND
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RAMBILASBRIDHU
CHAND

KPSRICHAND

Commerce he must be held to be bound by the rules of that Chamber.

MOOKERJEE J I agree with the Chief Justice

Appeal allowed

Attorneys for the appellant: *Mamuel & Agarwallah*

Attorneys for the respondents: *Pugh & Co*

W. M. C.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ

1914

Aug 4

PROKASH CHANDRA GHOSE

v

HASAN BANU BIBI.*

Mortgage—Interest—Loss of part of security by acquisition of mortgaged land—Mortgagee applying to Land Acquisition Judge for return of mortgage money (out of the compensation money) within term, whether entitled to interest for the whole term—Land Acquisition Act (I of 1894) ss 18, 30

If the mortgagee makes a demand for payment within the term, and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole of the term

Letts v Hutchins (1) *In re Moss* (2) *Smith v Smith* (3) referred to

Where the mortgagee has given notice requiring payment within the term he cannot withdraw it without the consent of the mortgagor

Santley v Hildes (4) followed

* Appeal from Original Decree, No 210 of 1913, against the decree of H P Dival District Judge of 24 Pargannas, dated April 26, 1913.

(1) (1871) L R 13 Eq. 176

(3) [1891] 3 Ch 550

(2) (1885) 31 Ch D 90

(4) [1899] 1 Ch 747, 2 Ch 474.

Where the mortgagor agreed to keep the money for one year from 28th September 1912 on condition that the land should remain as security for the loan during the term but one of the properties given as security had been acquired (the mortgagee probably having no knowledge thereof) and on the 11th October 1912 the mortgagor applied to the Land Acquisition Deputy Collector that the money due under the mortgage (including one full year's interest) might be paid to him out of the compensation money, and the mortgagor consented.

Held that as the contract between the parties could not be performed according to its letter by reason of circumstances beyond their control, the mortgagor was not bound to pay interest beyond the period of one month (as admitted by him).

Bahadur Begam v. Hussain Khanum (1) explained

APPEAL by the mortgagee, Prokash Chandra Ghose (petitioner) against an award in an apportionment case under the Land Acquisition Act

On the 28th September 1912, one HANAN BUNU BIBI mortgaged four properties in Calcutta (including her demarcated and partitioned share in premises No 16 Muhammad Crescent 2nd Lane) to one PROKASH CHUNDER GHOSE for Rs 5,000 interest being payable monthly at the rate of 12 per cent per annum, the mortgage in consequence not being redeemable till 28th September 1913. The statutory declaration for the acquisition of premises No 16, Muhammad Crescent 2nd Lane, had been published on the 28th February 1912 and the award of the Collector was made on the 20th September 1912, and apparently the mortgagee had no knowledge of these proceedings under the Land Acquisition Act. On the 11th October 1912, the mortgagee applied to the Land Acquisition Deputy Collector for payment to him (out of the compensation money) of Rs 5,000 as principal together with Rs 600 as interest thereon for one year, the mortgagee thus wanting a return of the mortgagee money within the first month only, together with interest for the full term of one

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year The mortgagor consented to the repayment of the principal amount but objected to the payment of one whole year's interest as, within one month of the mortgage and of the award, the mortgagee had prevented the mortgagor from enjoying the Rs 5,000 by pressing the Land-Acquisition Deputy Collector to stop payment to her of this sum. In fact the latter stopped payment to the mortgagor of the whole Rs 5,600 out of the compensation money. No objection was taken by either of the parties as to whether this question regarding the payment of interest for the whole term stipulated could be considered in the course of the land acquisition proceeding. On 13th January 1913 the Land-Acquisition Deputy Collector referred this dispute (as to apportionment of compensation) to the Court. In his judgment dated 26th April 1913, Mr H. P. Duval, the Special Land Acquisition Judge, held that the mortgagee was in equity entitled to only one month's interest of Rs 5,058 only out of the sum in deposit, as he could have called upon the mortgagor to give additional security under section 68 of the Transfer of Property Act, but preferred to follow the money in the Land Acquisition Court and thus realise his dues (with the consent of the mortgagor) before the time fixed.

Hence the mortgagee preferred this appeal to the High Court claiming an additional sum of Rs 550 as interest for the remaining eleven months.

Babu Bardya Nath Dutt (with him Babu Tarakeswar Pal Chowdhury, Babu Mohini Nath Bose and Babu Bhupendra K Ghose), for the appellant. The mortgage having been for a term of one year ending on 28th September 1913, the acquisition (within the term) of the land given as part security gives rise to no equity which supersedes the covenant to pay interest up to that date. Under the mortgage contract, the mortgagee is entitled to interest for a whole year and the

mortgagor is bound to pay that sum even though the mortgage money is repaid on an earlier date *Bakhtanar Begam v. Husam Khanum* (1). Further I rely on the provisions of sections 108 and 111 of the Land Clauses Act 1813 which relate to the acquisition of mortgaged properties in England.

Bibu Probodh Chandra Chatterjee for the respondent. The appellant gave me the use of his money for one year and I therefore agreed to pay him interest for that period but as he has subsequently deprived me of its use by wanting the return of the mortgage money within the term he is not entitled to interest for the full period of one year. *Bakhtanar Begam's Case* (1) is an authority only for the proposition that ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created the right of redemption can only arise on the expiration of the specified period. Here the contract between the parties cannot be performed according to its letter as the land has been acquired and the mortgagee has thus lost a part of his security and though he could have applied for additional security under section 68 of the Transfer of Property Act he immediately applied to the Land Acquisition Collector for the withdrawal of the money. So he is not entitled either by law or in equity to more than one month's interest.

Babu Baidya Nath Dutt in reply.

MOOKERJEE AND BEACHCROFT JJ. This appeal is directed against an award in an apportionment case under the Land Acquisition Act. The facts necessary for the decision of the question of law raised before us may be briefly stated.

On the 28th September 1912 the appellant advanced

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demand for payment within the term, and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole of the term. Reference may, in this connection, be made to the cases of *Letts v Hutchins* (1), *In re Moss* (2), and *Smith v. Smith* (3). Indeed where the mortgagee has given notice requiring payment within the term, he cannot withdraw it without the consent of the mortgagor. *Santley v Wilde* (4).

In the present case the mortgagee might have called upon the mortgagor, under section 68 of the Transfer of Property Act, to give additional security. He did not adopt that course and claimed a refund of the money, to which the mortgagor consented. Under these circumstances, it is plain that the mortgagor was not bound to pay interest beyond the period of one month. Reliance has finally been placed upon the provisions of sections 108 and 114 of the Land-Clauces Act, 1845, relating to the acquisition of mortgaged properties. It is sufficient to observe that the Indian Legislature has not framed similar provisions applicable to this country.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

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Appeal dismissed.

(1) (1871) L R 13 Eq 176

(3) [1891] 3 Ch 550

(2) (1885) 31 Ch D 90

(4) [1899] 1 Ch 747 2 Ch 474

APPELLATE CRIMINAL.

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Issue under of Charges—Joint trial for offences under s 120B of the Penal Code and ss 19 (f) 20 of the Arms Act, committed in pursuance of the object of the conspiracy—Identity of transaction—Criminal Procedure Code (Act V of 1898) s 239—Joint possession of arms—Mere keeping of fire arms not an offence—“Fire-arms” whether inclusive of parts of the same—Arms Act (XI of 1879) ss 4, 5, 11, 19(a) (f) 20—Criminal conspiracy, proof of—Punishment when act contemplated not done—Penal Code (Act XLV of 1860) ss 109 118, 120B

A charge of criminal conspiracy to manufacture arms, under s 120B of the Penal Code read with section 19(a) of the Arms Act (XI of 1879), may be tried jointly with charges of offences under ss 19 (f) and 20 of the latter Act committed in pursuance of the object of the conspiracy.

As long as the conspiracy continues the transaction which began with the forming of the common intention continues and the offences under ss 19 (f) and 20 of the Arms Act are committed in the course of the same transaction.

Legal Remembrancer, Bengal v. Mon Mohan Roy (1) followed.

Where two persons rented a house and lived in it and parts of arms were found in one of the rooms—

Held, that both being in joint occupation of the house, were in joint possession of the articles so found.

The word “fire arms” in s 14, read with the meaning of “arms” in s 4 of the Arms Act, includes parts of fire arms. “Fire-arms” means only arms fired by gunpowder or other explosives.

Ahmed Hassan v. Queen Empress (2), *Emperor v. Dhan Singh* (3) followed.

* Criminal Appeals Nos 591 and 592 of 1914, against the order of P. Pantou Additional Sessions Judge of 24 Parganas, dated June 15, 1914.

(1) (1914) 19 C. W. N. 672 (2) (1930) I L R 27 Cal. 692.

(3) 21 C. I. J. 195.

(7) (1907) III Cr L J 435, J.N. L. R. 53.

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The offence under ss 15 and 19 (a) of the Arms Act is not a mere keeping of arms, but a keeping of the same for sale.

In cases of conspiracy the agreement between the conspirators cannot generally be directly proved but only inferred from the established facts of the case. Where two persons took a house in which a considerable number of pieces of fire arms was found with tools and implements, and work had been actually done to some of the parts of fire arms, the Court may and ought to infer a conspiracy to manufacture arms.

Per CURRIE. Where there is only a conspiracy to manufacture arms without an actual manufacture the sentence should be imposed under s 120B of the Penal Code read with s 19 (a) of the Arms Act and s. 116 of the Penal Code, and the maximum term of imprisonment awardable under these sections is 9 months' rigorous imprisonment.

Per BEACHCROFT J. The punishment awardable under s 120B of the Penal Code varies according as the offence has or has not been committed in consequence of the conspiracy. If an offence has been committed the punishment is that provided by s 109 of the Penal Code though, strictly speaking, there should not be a conviction in such case of conspiracy but of abetment. If it has not been committed the punishment is governed by s 116 of the Penal Code.

APPEAL by Harsha Nath Chatterjee and another

The appellants were tried before the Additional Sessions Judge of the 24-Parganas with the aid of Assessors charged under (i) s 19(f) of the Arms Act (XI of 1878), (ii) s 20 of the same and (iii) s 120B of the Indian Penal Code. The Assessors found them guilty of offences under the Arms Act, but acquitted them of criminal conspiracy. The Sessions Judge, however, convicted them of all the three offences, and sentenced them to one year's rigorous imprisonment under the first, and to three years' rigorous imprisonment under the second and third charges, the sentences running concurrently.

On the 2nd December 1913, the two appellants went to the house of one Bhutnath Sil, a travelling agent of Messrs Ogler & Co who lived in Victoria Road, Brianagore for the purpose of renting a house in the same road belonging to one Nanda Lal De, the brother-

in-law of Bhutnath. The appellant, Khagendra, represented to Bhutnath that they were students of the Medical College, and gave his name as Kshitendra Nath Roy. He paid Rs. 7 rent in advance and received a *kutchra* receipt for the sum. The balance, Rs. 1, was paid subsequently, and a fresh receipt for the whole amount was given by N. L. De, the *kutchra* receipt being returned to him. Another month's rent was also paid and a receipt given for the same. The two accused lived in the house. It appeared that they used to keep the door and windows of the house abutting the road constantly closed.

On the 25th January 1911, Mr. Denham, Deputy Commissioner of Police, received certain information in consequence of which he proceeded to Baranagore with Mr. Buller, Inspector-General of Police, Mr. Lowman and other police officers. They reached the house in Victoria Road early next morning, burst open the door and entered the premises. Harsha Nath was found in the room abutting on the road and was arrested. Two search witnesses were called from the road and the police officers proceeded to search the place. In a room on the north of the court-yard were found the two rent receipts and, among other articles, certain parts of two double-barrelled breech-loading guns, viz., double-barrelled breech-loader action, trigger guard, trigger plate with triggers, trigger plate screw, double bolt part of a gun action, top lever part of a gun, barrel pin, guard or fire-end screws, guard pin, parts of a top lever spring broken nipples of a breech-loader and another complete gun action without the stock and locks. A search list was drawn up and the above were entered therein as items IX to XI, XIV to XVI, XIX, XX, XXII to XXXI. In addition, implements for the repairs of guns were also found in the room.

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Constables in plain clothes were then stationed in the vicinity of the house with instructions to arrest every one who entered. The first to do so was one Chinibas Neka, a waterman, who used to supply the inmates of the house daily with water. At 10 or 10-30 P.M., Khagendra was arrested as he entered the house. On being questioned by Mr. Denham next morning, he explained that he had gone to the house by invitation to see a friend named Dinobindhu Bhattacharji.

After a preliminary inquiry held by Babu P. C. Chatterjee, Deputy Magistrate, Alipore, the accused were committed to the Sessions on 4th March 1914. The trial came on before Mr. Panton, Additional Sessions Judge, with the aid of two assessors, on 4th June. The appellants were charged as follows—

First, that you, on or about the 26th January 1914, at Baranagore, had in your possession and under your control the arms Exhibits IX to XI, XIV to XVI XIX, XX, XXII to XXXI, in contravention of s 14 of the Arms Act an offence punishable under s 19 (f) of the Act

Secondly that you, on or about the 26th January 1914, at Baranagore, had in your possession and control the arms enumerated above in contravention of s 14 of the Arms Act in such manner as to indicate an intention that such act might not be known to any public servant. an offence punishable under s. 20 of the Act

Thirdly, that you, during a period from the 2nd December 1913 to 26th January 1914, conspired to manufacture or keep fire arms in contravention of the provisions of s 5 of the Arms Act, and thereby committed an offence under s 120B of the Penal Code read with s. 19 (g) of the Arms Act

The accused, who were convicted and sentenced as stated above, appealed to the High Court.

Mr. N. Sen, Mr. S. C. Roy, and Babu Khitish Chandra Neogi, for the accused, in appeal No. 591.

Mr. S. C. Roy, and Babu Ramani Mohan Chatterjee for the accused, in appeal No. 592

The Advocate-General (Mr. G. H. B. Kenrick, K.C.) Mr. N. Gupta, Babu Hemendra Nath Mitter, and

Babu Anode Chunder Chatterjee for the Crown in both cases

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Cum adu vult

FLETCHER J These are two appeals by the two accused against their conviction and the sentences passed on them by the learned Additional Sessions Judge of the 21 Parganas

The two accused were charged before the learned Sessions Judge with having committed offences under three heads. The first charge against the accused was that they had in their possession or under their control certain arms in contravention of the provisions of section 14 of the Indian Arms Act (Act XI of 1878). The second charge was that they had in their possession or control such arms in contravention of section 14 of the Indian Arms Act in such a manner as to indicate the intention that such act might not be known to any public servant. The third charge was that during a period from the 2nd of December 1913 to the 26th January 1914 they conspired to manufacture or keep fire arms in contravention of the provisions of section 1 of the Indian Arms Act. The two Assessors who assisted the learned Judge at the trial were of opinion that both the accused were guilty of the offences charged against them under the first two charges but that they were not guilty of the offence charged under the third charge. The learned Judge however convicted the two accused under all the three charges and sentenced each of them to undergo the following terms of imprisonment namely under the first charge one year's rigorous imprisonment and under the second and third charges three years rigorous imprisonment the sentences to run concurrently

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Constables in plain clothes were then stationed in the vicinity of the house with instructions to arrest every one who entered. The first to do so was one Chimbis Neka, a waterman who used to supply the inmates of the house daily with water. At 10 or 10-30 P.M., Khagendra was arrested as he entered the house. On being questioned by Mr. Denham next morning he explained that he had gone to the house by invitation to see a friend named Dinobindhu Bhattacharji.

After a preliminary inquiry held by Babu P. C. Chatterjee Deputy Magistrate Alipore the accused were committed to the Sessions on 4th March 1914. The trial came on before Mr. Panton Additional Sessions Judge, with the aid of two assessors on 4th June. The appellants were charged as follows—

First that you on or about the 26th January 1914 at Baranagore had in your possession and under your control the arms Exhibits IV to XI XII to XVI XIX XX XVII to XXXI in contravention of s. 14 of the Arms Act an offence punishable under s. 19 (f) of the Act.

Secondly, that you on or about the 26th January 1914 at Baranagore had in your possession and control the arms enumerated above in contravention of s. 14 of the Arms Act in such manner as to indicate an intention that such act might not be known to any public servant an offence punishable under s. 20 of the Act.

Thirdly that you during a period from the 2nd December 1913 to 26th January 1914 conspired to manufacture or keep fire arms in contravention of the provisions of s. 5 of the Arms Act and thereby committed an offence under s. 120B of the Penal Code read with s. 19 (c) of the Arms Act.

The accused who were convicted and sentenced as stated above, appealed to the High Court.

Mr. N. Sen, Mr. S. C. Roy and Babu Khutish Chandra Neogi for the accused, in appeal No. 591.

Mr. S. C. Roy and Babu Ramani Mohan Chatterjee for the accused, in appeal No. 592.

The Advocate-General (Mr. G. H. B. Kenrick K.C.), Mr. N. Gupta, Babu Hemendra Nath Mitter, and

Babu Anude Chunder Chatterjee for the Crown in both cases

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Cur adv vult

FLETCHER J. These are two appeals by the two accused against their conviction and the sentences passed on them by the learned Additional Sessions Judge of the 24 Parganas.

The two accused were charged before the learned Sessions Judge with having committed offences under three heads. The first charge against the accused was that they had in their possession or under their control certain arms in contravention of the provisions of section 14 of the Indian Arms Act (Act XI of 1878). The second charge was that they had in their possession or control such arms in contravention of section 14 of the Indian Arms Act in such a manner as to indicate the intention that such act might not be known to any public servant. The third charge was that during a period from the 2nd of December 1913 to the 26th January 1914 they conspired to manufacture or keep fire arms in contravention of the provisions of section 14 of the Indian Arms Act. The two Assessors who assisted the learned Judge at the trial were of opinion that both the accused were guilty of the offences charged against them under the first two charges but that they were not guilty of the offence charged under the third charge. The learned Judge however, convicted the two accused under all the three charges and sentenced each of them to undergo the following terms of imprisonment namely, under the first charge one year's rigorous imprisonment and under the second and third charges three years rigorous imprisonment the sentences to run concurrently.

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The facts of the case lie in a narrow compass. On the 25th of January last, Mr Denham, Deputy Commissioner of Police, received certain information. In consequence of this information Mr Denham accompanied by the Inspector-General of Police and certain other superior officers proceeded to a one-storied house in Victoria Road, Baranagore. Early in the morning of the 26th January they arrived at the house. The door of the house having been forced the party entered. The first accused Harsha Nath, *alias* Moti Lal, was found in the room that abuts on the road. In a room on the other side of the courtyard, portions of firearms and certain tools were found. Two receipts for the rent of the house were also found. The accused Harsha Nath was arrested. He declined to make any statement with reference to the things found in the house. A search list was then drawn up in the presence of witnesses and the party left. Constables in plain clothes were posted at the house with instructions to arrest any one who might come to the house. The first person to do so was the water-carrier, Chinibus Neka, who has been called as a witness for the prosecution. About 10 or 10.30 of the same night—the accused Khagendra in his statement fixes the hour as 8 or 8.30—the accused Khagendra arrived at the house and was arrested. The first question that we have to decide is what was the connection of the two accused with the house at Baranagore.

That they have some connection with the house is not denied, nor could it be since both of them were arrested there. The case for the prosecution is that on the 2nd of December last the two accused rented from the witness, Bhut Nath Sil, this house which is the property of his brother-in-law Nandi Lal De. The accused represented that they were students at the Calcutta Medical College and that owing to the high

prices ruling in Calcutta they found it convenient to live at Baranagore. The accused Khagendra gave the name of Khitindra Nath Roy. The rent of the house was fixed at Rs. 11 per mensem, and on the 2nd of December Khagendra paid Rs. 7 on account of the rent for that month and received the *kutchu* receipt Ex. 11. The balance of the rent for that month was subsequently paid and a formal receipt Ex. 2 was handed over. Another month's rent was subsequently paid and the receipt Ex. 1 was given. The *kutchu* receipt is said to have been returned by Khagendra when the formal receipt Ex. 2 was given to him. The two receipts Exs. 1 and 2 were found at the search on the 26th of January. The witnesses who depose to this part of the case are first Bhutnath Sil. He is employed as travelling agent of Messrs. Osler & Co. His pay is Rs. 90 per mensem, plus a commission which amounts to Rs. 1,000 to Rs. 1,500 per annum. He is, therefore, apparently a man of respectability. The next witness is Bhutnath's son, Bhupendra, a lad of 14 years of age, and the third witness is Nanda Lal De, a sub-engineer employed in the Public Works Department and brother-in-law to Bhutnath Sil. He is also apparently a man of respectability. The house at Baranagore belongs to Nanda Lal De but is let out and looked after by Bhutnath Sil who or whose family receives the rent.

The witness Bhutnath Sil states that on the 2nd of December last two men came to him and after certain negotiations took the house at a rent of Rs. 11 per mensem. A payment of Rs. 7 was made on account of the first month's rent and the *kutchu* receipt Ex. 11 was given. The man who carried on the negotiations gave the name of Khitindra Nath Roy: The witness is positive that this man is the accused Khagendra and he believes, although he is not certain,

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that the man who was with him is the other accused Harsha Nath. On that night Bhutnath left Calcutta for the United Provinces and did not return until the 28th of February on which day he gave his evidence before the Enquiring Magistrate. Counsel has attempted to throw doubt on the evidence of Bhutnath on the ground that before his return to Calcutta he was interviewed by a police officer. But in the ordinary course if the police intended to avail themselves of the evidence of Bhutnath they would have to interview him before calling him as a witness in order to find out what he would be able to prove. I see no reason to doubt the evidence of Bhutnath.

The boy Bhupendra states that on some date in December Khagendia came and paid to him the balance of the rent for that month. The witness states that he handed to Khagendia Ex 2 and received in return the receipt Ex 11. Further, this witness states that in January the two accused came to him and paid the rent for that month and received the receipt Ex 1. Bhupendra at a subsequent date identified the two accused at the Alipore Jail. This identification took place in the presence of a Magistrate and it is not suggested that the witness did not identify the accused. The witness states that he did not see the accused at the thana previously. The Sub-Inspector Dwijendra Nath Adhya says he does not remember whether Bhupendra saw the accused at the thana. But even if Bhupendra's identification cannot be wholly relied upon, there is a body of evidence that shows conclusively that the house was rented and occupied by both the accused.

Nanda Lal De was called chiefly to prove the receipts for rent. The two receipts Exs 1 and 2 were found at the search. Before the learned Judge a good deal of the cross-examination of some of the witnesses

was directed to show that the name Khitindia Nath Roy appearing on these two receipts was written in a different handwriting and with a different ink to the rest of the writing on the receipts. Mr Denham, however, is positive that these names appeared there when the receipts were found on the search and the search list supports his evidence.

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Then the evidence as to the occupation of the house shows clearly that these two accused were in occupation of the same.

The witness Chinitis Neka states that he took water to the house every day at 9 o'clock in the morning. He used to shake the chain and call out, when one of the accused would come and open the door for him. On his leaving, the door would be closed again.

The witness Bagwan Biswal, who is a *mali* in a garden opposite the house, states that he has seen Khagendra both entering and leaving the house. He further states that the doors and windows of the house were always kept shut. The evidence of Jagabandu Das which was given before the Committing Magistrate states that the windows and doors always remained shut. He further states that two men lived in the house in the latter part of Aghian and they did not mix or talk with the neighbours. Jagabandu died before the trial took place, but his deposition before the Committing Magistrate was put in.

As against this body of evidence showing the taking and occupation of the house by the two accused there are the statements of the accused. The accused Khagendra, in a written statement that he filed before the learned Judge, stated that one night about 15 or 16 days before his arrest he met one Dinabandhu Bhattacharjee who, he says, was with him at the Dacca Imperial Seminary in the Municipal Market. He

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states he asked Dinabandhu where he lived and that Dinabandhu said he lived at Baranagore where he worked for a contractor. On Dinabandhu asking a similar question of Khagendra the latter stated that he had no fixed place of abode as the police were trying to connect him with the Barisal conspiracy case. Dinabandhu then asked Khagendra if he would like to come with him for a day or two, and he said he would come next day. Next day accompanied by Dinabandhu he went to the house at Baranagore where he saw the other accused. He left after staying there two or three hours. On the 26th of January he returned to Baranagore at 8 or 8-30 A.M. and was arrested and taken to the police-station. This story is wholly improbable and does not cast any doubt on the direct evidence connecting Khagendra with the house. No trace of this Dinabandhu has been found, and there can be little doubt that he does not exist. Further the statement of Khagendra that he was in a public place like the Municipal Market when the police were searching for him is highly improbable. On the other hand, his statement that the police were searching for him may furnish a good reason why he should take this house at Baranagore to escape from the police. The evidence shows that he was successful in so doing between the 2nd of December and the 26th of January.

The statement of the accused Harsha Nath is that he came to Calcutta about the end of December to seek employment. He used to walk near the Gole Dighi and having a fine voice he used to sing. In this way he made many acquaintances including the aforesaid Dinabandhu. Dinabandhu hearing of the position of Harsha Nath forthwith invited him to come and stay in his house in Baranagore. Harsha Nath says he went to stay there on the 5th or 6th January. Some two or three days before his arrest Harsha Nath, says

Dinabandhu, left for "somewhere" on business expecting to return in three or four days. It is remarkable that Harsha Nath who was, according to his story, on terms of intimacy with Dinabandhu did not know the "somewhere" to which Dinabandhu had gone on business.

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The whole story of this accused, commencing with Dinabandhu who is alleged to be a resident of and employed at Baramagore taking his walks in College Square, Calcutta, down to Dinabandhu's departure for "somewhere" two or three days before Harsha Nath's arrest is manifestly untrue.

The evidence leaves no doubt in my mind that the two accused rented this house on the 2nd of December, and that they were jointly in possession of it, on the day of their arrest, *viz.* the 26th of January last.

It is not open to doubt that the tools and portions of fire-arms were found in the house at the time of the search. But it has been argued that the evidence does not establish in whose possession such articles were. Counsel has argued that there is some rule of law that in circumstances such as the present the Court cannot impute possession to either of the accused. There may, however, be joint possession of the articles and the fact as to whose possession the articles were in at the date of the search must be decided on the evidence in the case.

Now, the evidence establishes that both the accused were in joint possession and occupation of the house. They took the house falsely representing that they were medical students. The evidence on behalf of the prosecution also proves that during the occupation and possession of the accused, the doors and windows of the house were always kept closed. Why should the doors and windows of the house be kept closed? And can any one doubt that in that state of things

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both the inmates of the house must have been fully aware of what was going on in the house? The evidence leaves no doubt in my mind that both the accused were in fact in possession of these articles

I will now proceed to consider the case under the three charges that have been framed against the accused. But before doing so I will dispose of an objection raised by counsel as to the whole trial. It was argued that the whole trial was illegal owing to misjoinder of charges. That, however, clearly is not so. The offences charged in this case were committed in the same transaction and section 239 of the Code of Criminal Procedure authorises such charges to be tried together. If authority be wanted for the course adopted in the present case the very recent judgment of this Court in *Superintendent and Remembrancer of Legal Affairs, Bengal v Mon Mohan Roy* (1)

Coming then to the particular charges the first charge against the accused is framed under section 19 (f) of the Indian Arms Act, namely, of having in their possession or under their control arms in contravention of the provisions of section 14 of the Act. The arms of which section 14 prohibits the possession without a license are "fire arms". Section 4 of the Act says that the word "arms" as used in the Act shall include 'parts of arms'. That being so, unless there is something repugnant in the subject or context, wherever the word "arms" occurs in the Act it has got to be read as including "parts of arms". Moreover, by section 4 of the Act the words "arms" also includes "fire arms". That being so, it seems to me obvious that the word "fire-arms" as used in section 14 includes parts of the "fire-arms".

Section 1 clearly means that the whole includes the part and when the Act deals with a particular class of arms such as fire arms the section means that parts of fire arms are included in the word fire arms. The word fire arms only means arms that are fired by means of gunpowder or other explosive.

If section 14 prohibits the possession of arms that are fired by means of gunpowder or other explosive then clearly having regard to section 1 the possession of parts of such arms is prohibited. That the possession of parts of fire arms is prohibited by section 14 was decided by this Court in the case of *Ahmed Hossein v Queen Empress* (1). A similar view was also taken by the Court of the Judicial Commissioner for the Central Provinces in the case of *Emperor v Dhan Singh* (2).

In my opinion the learned Judge rightly convicted both the accused of being in possession of fire-arms in contravention of section 14 of the Act. The second charge against the accused was one of being in possession of fire arms in contravention of the provisions of section 14 in such manner as to indicate an intention that such act may not be known to any public servant. Under the provisions of section 20 of the Act this constitutes a different offence to that mentioned in section 19 (f). The only additional element necessary to constitute an offence under section 20 is that the possession should be in such manner as to indicate an intention that such act may not be known to any public servant. The evidence of concealment in the present case is clear and conclusive. The evidence proves that the two accused falsely representing themselves as medical students took the house at Burmagore and that the accused Khandendra gave a

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(1) (1900) I L R 27 Cal 692

(2) (1907) 5 Cr L J 435

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false name. Further, the door and windows of the house were kept closed and also a very important fact—the accused Khagendra was wanted by the Police and, therefore, would wish to conceal himself and what he was doing. On this evidence an offence under section 20 is proved against both the accused. The third charge against the accused was one of conspiring to manufacture or keep fire-arms punishable under section 120B of the Indian Penal Code read with section 19 (a) of the Indian Arms Act. The learned Judge has convicted both the accused of being parties to a conspiracy both to manufacture and keep arms. The learned Judge, however, is clearly wrong in treating the keeping of arms as an offence under section 19(a) of the Indian Arms Act. The offence is keeping for sale not keeping only. Does then the evidence prove a conspiracy to manufacture arms? Now, in cases of conspiracy the agreement between the conspirators cannot generally be directly proved but only inferred from other facts proved in the case. The facts proved in this case leave no doubt that such a conspiracy to manufacture arms existed between the two accused. First, there is the taking of the house. Next, the finding of a considerable number of pieces of fire-arms on the premises. To what use were these articles to be put? Then there is the fact of the finding of the tools at the premises. The evidence also shows that there is reason to believe that work had actually been done to some of the portions of fire-arms found at the search. From these facts the Court can and ought to infer that the two accused had conspired together to manufacture arms. On this charge the learned Judge sentenced each of the accused to undergo 3 years' rigorous imprisonment. That sentence, however, appears to be illegal. Section 120 B of the Indian

Penal Code provides that the accused in a case of criminal conspiracy shall be punished in the same manner as if he had abetted such offence. The learned Judge found that there was only a conspiracy to manufacture without an actual manufacture. The learned Judge has however sentenced the accused under the 3rd charge on the footing that the punishment was provided for by section 109 of the Indian Penal Code. But in that view the punishment for a conspirator is much more severe than the punishment for an abettor. Section 120B provides that they shall be punished the same. The sentence on the accused on the third charge ought on the findings made by the learned Judge to have been imposed under section 120B of the Indian Penal Code read with section 19(a) of the Indian Arms Act and section 116 of the Indian Penal Code. Under these sections the maximum sentence that can be imposed on the accused under the 3rd charge is one of nine months rigorous imprisonment. I think we ought therefore to reduce the sentence passed on each of the accused under the third charge to one of nine months rigorous imprisonment. I see no reason to interfere with the sentences passed under the other two charges. The two appeals will therefore subject to the reduction of the sentences passed under the third charge be dismissed.

BRACHCROFT J. I agree. As I was a member of the Bench which decided *Superintendent and Remembrancer of Legal Affairs Bengal v. Mon Mohan Roy* (1) it is perhaps sufficient to say that nothing that I have heard in argument in this case leads me to alter the opinion which I then formed as to the legality of trying together charges of conspiracy and of offences

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committed in carrying out the object of the conspiracy. But it will be as well to indicate shortly the line of argument taken and the fallacy which underlies it.

The argument was that the possession of fire arms is a totally distinct offence from the offence of conspiracy to manufacture arms, and as the offence of conspiracy is complete so soon as the persons *conspiring* have formed a common intention, the two offences cannot be said to have been committed in the same transaction. The fallacy in this argument is that it assumes that the transaction is complete as soon as an offence is committed, in other words, that the term transaction is synonymous with the term "offence." It is clear that, so long as the conspiracy continued, the transaction, which began with the forming of the common intention, continued, and the first two offences charged were committed in the course of this transaction.

The punishment that may be awarded on a conviction under section 120B, seems to vary according as the offence has or has not been committed in consequence of the conspiracy. If an offence has been committed the punishment is provided by section 109 of the Indian Penal Code, if an offence has not been committed punishment is limited to the extent provided by section 116. Perhaps, strictly speaking, in the former case there should not be a conviction for conspiracy but for the abetment of the offence for conspiracy followed by an act done to carry out the purpose of the conspiracy amounts to abetment. In the present case there has been no finding by the Judge, nor can it on the evidence be found as a fact that the offence was committed. The sentence that can be imposed is, therefore, that provided by section 116.

E H M

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., Woodroffe and Mukerjee JJ

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April 29.

Contempt of Court—Practice—Appeal—Assisting in contempt—Procedure

Where the prohibitory injunction on the defendant firm made no mention of M, an assistant, or of servants and agents, but the notice of motion for committal for breach thereof was upon M who did nothing after service on him of the injunction

Held, that the notice of motion was erroneous, and the procedure which had been adopted was misconceived: the proceedings against M, if any, should have been for assisting in a contempt of Court

Held, also, (on the merits) that there had been no contempt or participation in contempt on M's part, as all that he did had been done prior to the injunction

APPEAL by John Innes Marshall, an assistant in the firm of J. I. Kendrew & Co., the defendants, from the judgment of Greaves J., dated 31st March 1915.

The facts of the proceedings for injunction and for committal for contempt for breach thereof, out of which this appeal arises, appear fully from the following judgment of Greaves J., dated 31st March 1915.—

"The notice of motion in this case is directed to one J. I. Marshall, who is in the employ of the defendant firm, and it asks that he shall stand committed to the Presidency Jail for having committed a breach of an injunction granted by me on the 20th March instant, *restraining the defendant firm, their servants and agents* (I am here quoting the words of the motion) from disposing of, selling, or dealing in any manner with, the goods referred to in the plaint herein over Tuesday, the 23rd of March 1915

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and for an order on J I Marshall to pay to the plaintiff his costs of and incidental to this application. The notice of motion is dated 26th March 1915 and was duly served on Mr Marshall.

This application arises under the following circumstances —

On the 30th of January 1914, a contract was entered into between the plaintiff (Grandhi Venkata Ratnam) and the defendants (J F Kendrew & Co) for the sale of 500 cases of matches. Certain of the cases were delivered between the months of March and December 1914 but on that day certain cases still remained undelivered. On the 17th of March of this year the plaintiff received information to the effect that another consignment of matches of 75 cases marked with the plaintiff's name had arrived in Calcutta and that the defendant firm was trying to dispose of them to somebody other than the plaintiff. Thereupon interviews took place between the defendant firm and the plaintiff's son and the defendant firm expressed their willingness to deliver the goods at a certain price which was higher than the price which the plaintiff considered that he was bound to pay. On the 19th of March, the defendants threatened to dispose of the goods, unless the plaintiff purchased them at the price of 1s 6½d per gross. They threatened to sell the goods by 11 o'clock on the 20th of March unless the plaintiff was willing to pay this price. On the same day, the 19th March, a letter was written by the plaintiff's solicitor saying that the defendant could not sell the goods to a third person, as they were the property of the plaintiff. On the 20th March 1915 the plaint was filed in this suit at 12 o'clock, and, at 1.30 on that day, an application was made to me for an injunction and I granted an *ad interim* injunction over the following Tuesday in these terms, *restraining the defendants from selling disposing of, or otherwise dealing with the goods referred to in paragraph 3 of the plaint, and I gave the plaintiff liberty to serve the defendants with the notice of motion for the following Tuesday, for an injunction restraining the defendants from selling, disposing of, or dealing with, the goods pending the hearing of this action and for a Receiver of the goods.* I directed the notice of motion to be served before 4 o'clock at No 3, Commercial Buildings where the defendant firm carry on business or if these premises were closed, then on Mr Cameron who was the manager of the defendant firm, at his private address. It appears, from the evidence of the plaintiff before me, that after the injunction was granted, the plaintiff's son accompanied by one Ashray Kumar Rudra, an attorney of this Court and assistant of Babu Charu Chandra Bose, Attorney for the plaintiff, went to No 3 Commercial Buildings and arrived there at about 2.15 P.M. They enquired at the office for Mr Cameron and were told that Mr Cameron was not there, and thereupon the plaintiff's son took the attorney to Mr Marshall,

and he was the next superior officer in the office of the defendant firm. The plaintiff's son and his attorney stated that they read out a copy of my order to Mr Marshall in the presence of Mr Surita, an advocate of this Court and that after reading out the same they handed Mr Marshall a copy of the order and they state that he read the same in their presence and in the presence of Mr Surita that they asked Mr Marshall to sign an acknowledgment of the receipt of the copy of the said order but Mr Marshall refused to do this and said that his firm had already told the goods Akulax Kumar Podra the attorney, goes on to say that he attended immediately after at the office of the Jetty Superintendent of the Port Commissioners with the plaintiff's son, and showed a copy of my order to the Deputy Superintendent and read out the same to him and asked him to sign an acknowledgment which he refused to do saying that he could only act on an order signed by an officer of this Court. Both the deponents state that at the goods shed at the Jetty, they saw several cases of matches marked with the plaintiff's mark, which was pointed out and the attorney states that he pointed out the goods to the plaintiff's son and also to one Satya Charan Ray who was the Jetty sircar of the plaintiff, asking the plaintiff's son to count the number of packages there, which he and the Jetty sircar accordingly did, telling the attorney that there were 75 cases of matches lying there. The affidavit of the attorney further states that, on the following day, he was informed by the plaintiff's son that 53 cases of matches had been sent to the Howrah station and the same were lying there at No. 18 Goods Shed, Howrah. There is an affidavit also filed on behalf of the plaintiff by Satya Charan Ray, confirming the counting of the cases of matches and also stating that after the attorney and the plaintiff's son had left one Pran Kristo Coondoo who was a sircar at the employ of the defendant company and whom he knew, came to Jetty No. 2 and gave directions to certain cartmen to take the goods to Murgibhatia G. low n baree. He states that a portion of these goods were, thereafter, removed to Jetty Shed No. 2 by the employee of the defendant company.

On behalf of Mr Marshall, 3 affidavits are filed one by himself in which he states at paragraph 4 that, about 2.30, after office hours and after the business of the defendant firm was closed for the day, and while he was preparing to leave the office being actually in the act of changing his clothes a person whom he did not know, accompanied by one Grandhi Subramantam, called, and saw him at No. 3 Commercial Buildings stating that he was an assistant of Messrs Bose and Company and wanted to see Mr Cameron. Mr Marshall states that he informed him that Mr Cameron was away from office and he, Mr Marshall was the next officer in charge of the office. Mr Marshall states that the attorney informed him that

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he had obtained an injunction restraining Mr Cameron from disposing of the 75 cases of the matches in question, and that he told him, as was the fact, *that they had already been sold and paid for*, and then the attorney asked him to whom they had been sold; he thereupon said that, if they wrote and asked him he would give them information in writing as he did not want to run the risk of being misrepresented if he gave any information verbally; Mr Marshall then goes on to state that he left the office shortly after with Mr Surita and one Mr Moss who were both present. Mr Marshall further states that the attorney produced and handed to him a piece of paper with some typewritten matter on it which bore no signature to shew that it was a copy of an actual order. He states that he glanced at the document, but did not read it through before handing it back to him and he denies that the document was read out to him and he is supported in his denial by an affidavit of Mr Surita. In paragraph 6 of his affidavit Mr Marshall states that he had nothing whatever to do with the removal of or the endeavour to remove any of the goods in question, and that he never at any time sold or disposed of or otherwise dealt with the goods or any of them in disobedience or contempt or breach of the alleged injunction or order, and he states in paragraph 7, that for the first time he came to hear that the Jetty sircar Pran Kisto Coondoo had been concerned in the removal of the said goods, when he found the statements to that effect in that affidavit of Satya Charan Roy. He states that this removal was not done in pursuance of any order or injunction given by him or by any one belonging to the defendant firm and he states that he has since ascertained that the sircar did, on the 20th of March, remove or cause to be removed some of the goods, but that he did so after office hours in his spare time and at the request of and on behalf of the purchaser Jugal Kishore Pyne, and is nowise on behalf of the defendant firm.

As before stated, Mr Surita filed an affidavit which corroborates Mr Marshall's statements with regard to the interview on the afternoon of 20th March. A further affidavit is filed on his behalf by one Jugal Kishore Pyne who states that on the 3rd of March, he agreed to purchase from the defendant firm 75 cases of matches at Rs 17 6 per gross. He states that the purchase was completed by him at the office of the defendants on 20th March and that he paid a sum of Rs 5507 13 0 as referred to, as the price of the matches, and that he was thereupon handed the gate pass in respect of the goods, to obtain delivery from the Port Commissioners' Jetty. He states that the purchase price was paid and the whole transaction was completed by some time between 12 noon and 12 30 on Saturday, and that he thereupon immediately arranged with one Pran Kisto Coondoo, the defendant firm's Jetty sircar, for an extra charge of Rs 3 to remove the

goods from the Jetty to his godown at Sukea's Lane, and that he gave him the gate pass. He states that some time about 4 or 4-30 in the afternoon, he returned to his godown and there found that in the interval 53 cases out of 75 cases had been brought from the Jetty and stored there, and he never heard about any injunction until 22nd March.

Now, it is urged before me on behalf of Mr. Marshall that there has been no breach of the terms of the injunction, inasmuch as he has not sold, disposed of, or otherwise dealt with, the goods, and considerable discussion took place before me with regard to the absence from my order of the words "permitting the disposal of or dealing with the goods", and that was urged on behalf of Mr. Marshall that, in the absence of these words, he had committed no breach of injunction and that he was not guilty of any contempt of Court. In my opinion the absence of these words makes no difference. see *Harding v. Tinney* (1).

Now, it seems to me abundantly clear from the facts stated in the affidavits that, if Mr. Marshall had applied his mind to the injunction and communicated with the Jetty Superintendent or with the purchaser of the goods, or in any case, if he had communicated the name of the purchaser to the plaintiff, the removal of the goods in question could not have taken place, and that in that case these proceedings would not have been brought. Of course, when it comes to a matter affecting the liberty of the subject, he is entitled to have the terms of the injunction considered with the greatest strictness and have everything that could possibly be urged or said in his favour considered on his behalf and given effect to, and it would clearly be wrong to send Mr. Marshall to prison having regard to the facts and circumstances of this case, but I cannot think that he performed the duty, which is incumbent on every good citizen to perform, of assisting the process of the Court in whatever form it comes before him. That the goods were dealt with despite the injunction or after it had been granted was due to his action or rather inaction; he has therefore committed contempt of Court and accordingly, although I make no order for committal, I direct Mr. Marshall to pay the costs of this motion."

Mr. Marshall, being dissatisfied with the above order, preferred this appeal.

Mr. M. Zorab (with him Mr. Hyam), for the appellant. This is the contempt^d motion of the 26th March 1915. Mr. Justice Greaves has found me guilty of contempt of Court and has ordered me to pay costs.

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[JENKINS, C.J. We were told that he was ordered to pay costs without being found guilty of contempt.]

Since getting a copy of the order I find from the judgment that he has been found guilty of contempt.

[JENKINS, C.J. That gets over the difficulty of the appeal lying.]

Yes. The terms of the injunction restrain the defendants only, and nothing is said about their "servants or agents." Notice of the injunction was directed to be served on Mr. Cameron, the Manager of Messrs. Kendrew & Co., whereas Mr. Marshall is an employee under him. It is not a mandatory injunction, but a prohibitory one. The words "servants and agents" have been added in the notice of motion for committal for contempt for breach thereof.

I submit (i) that, the injunction being directed to the defendant firm, Mr. Marshall could not be proceeded against for breach of injunction (might be for contempt): see *Lord Wellesley v. The Earl of Mornington* (1). (ii) If I could not be found guilty of breach of injunction, I could not be shown to be guilty of any other species of contempt of Court, which is the genus, breach of injunction being a species. I must have an opportunity of tendering an apology on general principles and therefore I am entitled to know the particulars of the breach. (iii) Upon the merits—the affidavits in support of this motion do not show breach of injunction, or contempt of any kind. (iv) There are no materials, no discretion, much less jurisdiction of Court, to order me to pay costs, and farther the Court proceeded on a misapprehension of facts. The two cases of *Lord Wellesley v. The Earl of Mornington* (1) show that the injunction really did not extend to servants and agents.

I therefore submit that the case for breach of injunction must go, and there is no such finding either

[JENKINS C. J. You submit that the procedure on injunction must be followed?]

Yes. See Kerr on injunction with regard to the procedure to be followed; also Woodroffe's injunction, 3rd Edition, p. 73. The motion is to be supported by affidavit specifying the particular acts constituting breach.

Passing on to the *merits* in paragraph 7 of their affidavit they say they gave notice of injunction to me and that Prun Kristo Coondoo was instrumental in removing the goods from the Jetty. It being a Saturday and Mr. Justice Imam being indisposed, the injunction order was got from Mr. Justice Greaves at his house. Mr. Marshall, at 2-30 P.M. the same day, said the goods had been sold (though 53 only out of 75 cases had been removed). We had already sold them to Jugal Kishore Pyne, and the injunction itself had failed.

[JENKINS C. J. It does not appear that Marshall did anything?]

Nothing, except that a letter was written by him before 11 o'clock on the 20th March, the injunction being intimated to Mr. Marshall at 2-30 P.M. that day.

[MOOKERJEE J. Is Mr. Marshall said to have done anything beyond what is stated in paragraph 7?]

That is all.

That is just the reason why Mr. Justice Greaves set it aside. Further, the goods are alleged to have been removed by the sucra of Messrs. Kendrew & Co., on behalf of and under payment from the purchaser Jugal Kishore Pyne. The learned Judge refers to the case of *Harding v. Tinney* (1) cited in Kerr on

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Injunctions for quite a different purpose I submit that this order cannot stand

[JENKINS C J We will hear the respondent now]

Mr N N Sircar (with him *Mr C C Ghose*) for the respondent I wish to support the order Assuming *Mr Marshall* knew nothing at all about the order of injunction though the selling had been completed, he knew at 2.30 PM on Saturday that the order of the court prevented the defendant *dealing with or disposing of the goods at the Jetty* *Marshall* was the next man in the office after *Cameron* and their firm *which removes the goods* The papers show that *Marshall's statement on the 26th* that he knew nothing is absolutely false He admits he glanced through it Yet he would not give the name of the purchaser

[JENKINS C J What has that got to do with the question before us—whether he did anything towards selling or disposing?]

That is one of the facts that will go to show that *Marshall* was determined not to carry out or give effect to the Court's order If his story is accepted, there can be no breach of injunction or contempt And must we serve every driver or servant of the firm?

[JENKINS C J You have your remedy against the firm]

The partners are not here But *Marshall* who was in charge of these goods with our mark on them dealt with them and sold them *before* and *again* dealt with them *after* the injunction

[JENKINS C J How do you show he assisted in the breach?]

In this way the *sircar* does not make any affidavit and *Marshall* says he knew nothing about the removal till the 26th The whole intention of that injunction was to keep the goods where they were On their

own showing the goods were not removed till 4-30 P.M. He came to Court with two absolutely lying cases: Marshall's attorney says that the goods were sold and removed in the morning, while Marshall in paragraph 7 of his affidavit denies removal under his orders. Marshall has got to change his case because he found from the plaintiff's affidavit that they had found all the goods at the Jetty where they had proceeded direct from Marshall's office on Saturday.

[MOOKERJEE J. If the purchaser had got the gate-pass, then there was a delivery to him?]

That is what the purchaser, Jugal Kishore Pyne, says in his affidavit.

[JENKINS C.J. There is no suggestion that that is false. As to Marshall lying, there is nothing to show it. It seems to us you misapprehend the position.]

I cannot carry the case further.

JENKINS C.J. This is an appeal from an order of Mr. Justice Greaves which has been treated before us as an order finding that there had been a contempt by the appellant Marshall which merited, if not imprisonment, at any rate, the payment of the costs of the motion. The notice of motion called upon J. I. Marshall, an assistant of the defendant firm, to take notice that, on Monday the 29th March 1915, an application would be made on behalf of the plaintiff for an order that he, J. I. Marshall, do stand committed to the custody of the Superintendent of the Presidency Jail for having committed a breach of the injunction granted by Mr. Justice Greaves on the 20th March 1915, restraining the defendant firm, *their servants and agents* from disposing of, selling or dealing in any manner with, the goods referred to in the plaint. That notice of motion is erroneous, for, the injunction

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makes no mention of Mr Marshall or of servants and agents. It necessarily follows from this that the procedure which had been adopted was misconceived. The proceedings against Mr Marshall, if any, should have been for *assisting* in a contempt of Court. But the case need not be disposed of on that ground, because, on the merits, it has not been made out that Mr Marshall in any way assisted in a contempt of Court. He did nothing. He did not dispose of, sell, or deal with the goods. Nor did he in any way assist in disposing, selling of, or dealing with them *after* service on him of the injunction. All that he did was done prior to the injunction. It has been suggested before us that he is in some way responsible for the delivery which is said to have taken place after the injunction. But on the facts it appears that the delivery was prior to the injunction. There was no contempt or participation in contempt on Mr Marshall's part. In my opinion, the order of the learned Judge is erroneous and must be set aside and the motion dismissed with costs of the hearing before Mr Justice GRIFFITHS and before us.

WOODROFFE J I agree

MOOKERJEE J I agree

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Appeal allowed

Attorneys for the appellant Orr, Dignam & Co

Attorney for the respondent Charu Chandra Bose

PRIVY COUNCIL.

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(AND ANOTHER APPEAL CONSOLIDATED).

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[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu Law—Intestance—Succession to Impartible Estate governed by rule of primogeniture where no custom excluding females existed—Widow of holder who died without male issue—Evidence of separation in joint family—Junior member leaving family house and living in separate residence after obtaining grant for maintenance

The SUCCESSION, on the death of a holder without male issue, to an impartible estate which descended by the rule of primogeniture, the junior members of the family being entitled to grants for maintenance, and where no custom excluding females existed, depended on whether there had been a separation between two brothers, the father and predecessor in title of the deceased holder and the father of the next contingent reversioner. On that question the Courts in India differed the Subordinate Judge finding that a separation had taken place, and the High Court being of opinion that what had occurred did not in intention and fact amount to a complete separation.

Held (reversing the decision of the High Court) that the evidence clearly proved that there had been a complete separation, and that the widow of the last holder was therefore entitled to succeed to the estate for a Hindu widow's interest in priority to the next male reversioner.

Consolidated appeal 31 of 1913 from a judgment and two decrees (7th January 1910) of the High Court at Calcutta, which reversed a judgment and two decrees (22nd January 1909) of the Court of the Subordinate Judge of Monghyr.

The plaintiffs were the appellants to His Majesty in Council.

* *Present* VISCOUNT HALDANE LORD SHAW, SIR JOHN FRYE AND MR. AMERLI

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The main question for determination on this appeal was as to whether the appellants had established that a separation took place between the respective predecessors in interest of the appellants and the respondents, (the said predecessors having been two brothers members of a Hindu joint family governed by the Mitakshara law), so as to bar the title of the respondents to the property in suit

That property was an ancestral family property, called Talaki Telwa, an impartible estate the succession to which was governed by the rule of primogeniture. It descended to, and was owned by, Thakur Bhairo Narayan Singh who died in 1272 F.S (1863) leaving two sons, Ranjit Narayan Singh and Bhupat Narayan Singh

The succession to the estate was regulated by a custom of the family by which the eldest son of the last holder succeeded to the *gadi* as sole owner, the other sons being entitled to receive maintenance. In accordance with the custom Ranjit Narayan, on the death of his father, succeeded to the *gadi* as Thakur, and on 14th Assin 1287 F.S (14th September 1879) Ranjit Narayan executed a *mokurani pottah* in favour of his younger brother Bhupat Narayan, by which he assigned to him 2 mouzahs and 4 bighas of kumat land in another mouzah as a grant for his maintenance. By the terms of the deed the land granted was not alienable by the grantee, but notwithstanding that prohibition Bhupat Narayan executed mortgages from time to time in order to raise money when he needed it

In 1306 F.S (1897) Ranjit Narayan died leaving a widow Gian Kumari, and a minor son Ram Narayan. The widow was made guardian of her minor son who, according to the custom, succeeded to the *gadi* as Thakur.

Bhupat Narayan died in Mgh 1311 I E (1902) leaving a son the respondent Chaturbhuj Narayan whose four sons were the other respondents

Ram Narayan died while still a minor in 1312 F S (1903) leaving no issue but only a widow the appellant Tara Kumari. She applied to the Revenue Courts to have her name registered as heiress of her deceased husband and as such proprietress of the gadi Chaturbhuj Narayan who claimed to be the Thakur on the death of Ram Narayan without male issue made objection. He alleged that he and Bhupat Narayan had never ceased to be joint members of the family with Ranjit Narayan and Ram Narayan and that he alone succeeded to the *gadi* on the death of the latter according to the custom and that he had since been in possession and he also applied for registration of his name as Thakur his application being granted and Tara Kumari's rejected a decision which was subsequently confirmed on appeal by the Revenue Courts and authorities

During his life time Thakur Ranjit Narayan Singh had incurred debts and had executed certain mortgages and after his death his creditors demanded payment. Tara Kumari thereupon sold a half share of Taluk Telwa to the appellant Maharajah Sir Ravenshaw Pershad Singh Bahadur for Rs 50 000 on 16th September 1906 which was to be applied to pay off the amount due on the mortgages amounting to Rs 47 639 and the balance was to defray the expenses of Tara Kumari in the present litigation. The appellant the Maharajah paid off the mortgages

On 19th August 1907 the appellants instituted the present suits against the respondents. She joined the Maharajah as a formal defendant in her suit and he joined her as a defendant in his suit in the same way, and also made the mortgagees party defendants

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The claim in each suit was substantially for a declaration that Tara Kumari had succeeded to the estate as heiress on the death of her husband, and that the defendant Chaturbhui Narayan Singh had no title thereto, on the ground that the mukdari grant of 1287 F.S. had constituted a separation between Ranjit Narayan and his brother Bhupat, and that from that time they had ceased to be members of a joint family and the *gadi* had formed the separate estate of Ranjit Narayan. The plaintiffs claimed to recover possession of their respective half shares.

The Maharajah in his plaint also prayed in the alternative for relief on the basis of the mortgages which he had paid off, and of which he was the assignee, in the event of its being held that the defendant, Chaturbhui Narayan, was entitled to the property in succession to Ram Narayan.

The defendant Chaturbhui Narayan denied that there had been any separation between Ranjit Narayan and Bhupat Narayan as alleged. He contended that they had remained joint in food and estate, that the mukdari pottah was merely a provision for maintenance, and he claimed that he became, on the death of Ram Narayan, the owner of the estate. He also contended that the plaintiff Maharajah could not in the same suit claim relief in the alternative as he had done.

The only issues material for the purposes of this appeal were—

(1) Is the suit bad for misjoinder of parties and causes of action?

(2) Did Bhupat Narayan Singh and his son Chaturbhui Narayan separate from Thakur Ranjit Narayan Singh and Ram Narayan Singh in food and estate, and did the two branches of the family headed by Thakur Ranjit Narayan Singh and Bhupat Narayan Singh

live joint in food and estate till the death of Thakur Ram Narayan Singh?

(iii) If the two branches of the family separated, as alleged by the plaintiffs, did Taluk Telwa continue to be joint undivided property of the family even after the separation, by reason of its being impartible ancestral property, and did it pass to the defendant Chaturbhuj Narayan Singh by survivorship on the death of Thakur Ram Narayan Singh in preference to his widow?

The Subordinate Judge held on the facts proved before him that Bhupat Narayan Singh separated from his elder brother after the execution of the mukurari pottah in his favour, and that the first defendant (Chaturbhuj Narayan Singh) as a separated member of the family was not entitled to succeed to the estate in preference to the plaintiff Tara Kumari as the widow of the last holder. He also held that the Maharajah's suit was not bad for misjoinder of parties or causes of action; that the sale to him was valid; that the mortgages were for family ancestral debts; that they were duly paid off by the Maharajah; and that he was entitled to recover such payments from the estate. He was, however, of opinion that the alternative relief claimed by him could not be granted inasmuch as he had not asked for consequential relief.

Both suits were accordingly decreed, and so far as the titles of the plaintiffs were respectively concerned they were declared entitled to equal half shares of the estate with possession and costs from the first defendant.

Appeals were preferred by the defendants from each of those decrees to the High Court, and were heard by a Division Bench of that Court consisting of BRETT and SHARFUDDIN JJ. who reversed the decrees of the Subordinate Judge, and dismissed both suits with costs.

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The High Court, while accepting all the facts as found by the Subordinate Judge, was of opinion that such facts were not sufficient to prove that there was a "complete separation" between Bhupit Narayan Singh and Rinit Narayan Singh, and it accordingly held that at the time of the death of Thakur Ram Narayan Singh the first defendant and his sons were not separate from him, and therefore that "the estate must follow the ordinary line of inheritance to joint property under the Mitakshara law, subject to the rule of primogeniture"

As to the alternative relief claimed by the Maharajah as transferee of the mortgages, the High Court was of opinion "that it could not be claimed in the suit as framed, being inconsistent with the main relief sought in the suit," but it agreed with the Subordinate Judge in holding that the debts for which the mortgages had been given were family ancestral debts legally recoverable from the estate, and which had been discharged by the Maharajah

On these appeals,

Sir R Finlay, K C, and G R Lowndes, for the appellants, contended that at the time of the death of Ram Narayan Singh, Chaturbhuj Narayan, the first respondent, and his sons were separated from him in food, worship and estate, and had no right, in preference to Tara Kumari, to succeed to any part of the estate in suit. The property being said by the respondents to be impartible the appellants had to show that a separation as above took place, and it was submitted that on the evidence in the case it had been established that there had been a complete separation, and that the Subordinate Judge had rightly so held. The respondents rely on, among others, the case of *Lalteshwar Singh v.*

Rameshwar Singh (1) to support their contention that this estate being impartible there can be no separation in estate between Ranjit Narayan and his brother Bhupat Narayan, but if that was the holding in that case, it is submitted it was wrongly decided. In the present case the grant of the mukurari pottah, it was contended, showed an indication of an intention to separate, and it is certain that Bhupat Narayan, after the lease was granted, went away, built himself a house, and lived in it apart from his brother. He, and not Ranjit Narayan though then head of the family, had paid the expenses of a daughter's marriage and had borrowed money to do so after the granting of the mukurari lease, and Bhupat Narayan had in 1905 stated in proceedings in Court that he was separate from the Thakur. Even if the estate is impartible, it was submitted that the question of separation was one of intention and of fact to be determined on the evidence. *Begat Bahadur Singh v Bhupindra Bahadur Singh* (2). Stokes's Hindu Law, Books 166-167, and Mitakshara, Chapter II, Section 12, verse 1, were also referred to.

As to the alternative relief and misjoinder of parties in the case of the Mukurari appellant, reference was made to the Civil Procedure Code, 1908, Sections 45 and 28. There was no objection in law to alternative inconsistent claims and it was not necessary for the plaintiff to seek consequential relief by suing for payment of the mortgage debts.

DeGruyther, K C, and *A M Dunne*, for the respondents contended that the appellants had wholly failed on the evidence to establish any separation according to Hindu Law between Ranjit Narayan Singh and Bhupat Narayan Singh, that the rights of Bhupat and

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(1) (1909) I L R 36 Cal 491

(2) (1895) I L R 17 All 456

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his sons and descendants as junior members of the joint family continued up to the death of Ram Narayan Singh, and that the respondent Chaturbhuj Narayan Singh then became entitled to the property in suit as Thakur and owner of it. Impartible property on devolution, it was submitted, becomes joint property for the purpose of devolution, and therefore the widow being only entitled to maintenance is excluded—see Mayne's Hindu Law (7th edition), pages 731, 732, also page 671 paragraph 495 [Sir R Finlay, K C, said the property, being impartible, was never joint] The case of *Lalteshwar Singh v Rameshwar Singh* (1) decided that there can be no separation in estate in the case of an impartible raj, see also *Raja Rup Singh v Rani Baisni* (2). In that case what the contention now is was laid down thus—After referring to the case of *Chintamun Singh v Nowlukho Konwari* (3), their Lordships say, "In the last mentioned case, following the decision in *Yanumula Venkayamah v Yanumula Boochia Van-kondora* (4), it was held that an ancestral estate even though impartible is not the separate or self-acquired estate of the single member upon whom it devolves so long as the family continues joint" see *Venkata Rao v Court of Wards* (5) [Sir John Edge referred to *Chintamun Singh v Nowlukho Konwari* (3)]. In that case there was in fact a partition of part of the property in 1832 as is shown in the original record of the case, the rest of the property remaining undivided. Here there was no separation. The mukurani grant was one merely for maintenance, and did not indicate any intention to separate [VISCOUNT HALDANE] You

(1) (1909) 11 P 36 Cal 481 (3) (1875) 11 I 1 Cal 163

(2) (1884) 11 I 7 All 1, 11 I R 21 A 263

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Ram Nundun Singh v Janki Koer (1) *Raja Rup Singh v Rani Baisni* (2) was distinguishable as the family was joint in that case, and a widow could only get maintenance. This case must be determined on the evidence *Bejar Bahadur Singh v. Bhuvendra Bahadur Singh* (3), and here there was sufficient evidence, it was submitted, of separation.

The judgment of their Lordships was delivered by

SIR JOHN EDGE These are consolidated appeals. That in which Thakurani Tara Kumari is the appellant has arisen in a suit which was brought by her on the 19th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In that suit Maharajah Sir Ravaneshwar Pershad Singh was a *pro forma* defendant. The other appeal in which Maharajah Sir Ravaneshwar Pershad Singh is the appellant, has arisen in a suit which was brought by him on the 19th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In the latter suit Thakurani Tara Kumari and others were *pro forma* defendants. In each suit the Subordinate Judge made a decree in favour of the plaintiff in the suit. From each decree Chaturbhuj Narayan Singh and his minor sons appealed to the High Court of Judicature at Fort William in Bengal, which, by its decree in each appeal, reversed the decree to which the appeal related and dismissed the suit. From those decrees of the High Court these consolidated appeals have been brought.

The Thakurani is the widow of Thakur Ram

(1) (1902) I L R 29 Cal 823 (2) (1884) I L R 7 All 1,

I R 29 I A 178

L R 11 I A 149

(3) (1895) I L R 17 All 456, L R 22 I A 139, 156

Narayan Singh, who was a son of Thakur Ranjit Narayan Singh, who was the elder of the two sons of Thakur Bhairu Narayan Singh. Chaturbhuj Narayan Singh was the son of Bhupat Narayan Singh, who was the younger son of Thakur Bhairu Narayan Singh. Thakur Ram Narayan Singh died without issue male. The immovable property to which the suits relate is known as Taluka Telwa, otherwise the Telwa Gah in the district of Monghyr. Taluka Telwa is an ancestral imputible estate which, in his lifetime, was held as his estate by Thakur Ram Narayan Singh, and had previously been held by his father Thakur Ranjit Narayan Singh and before him by his father Thakur Bhairu Narayan Singh. By the kulachar or family custom Taluka Telwa descends by the rule of primogeniture. The appellants allege that Thakur Ranjit Narayan Singh, on the 14th September 1879, granted to his brother Bhupat Narayan Singh a mukutani pottah (perpetual lease) of a part of Taluka Telwa for the maintenance of Bhupat Narayan Singh and his descendants, and that Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh separated and ceased to constitute a joint Hindu family, except in so far as the family custom applies, the law of the Mitakshara governed Thakur Bhairu Narayan Singh and his descendants. The Thakurani claims that she, as the widow of Thakur Ram Narayan Singh, who left no issue, succeeded to the estate on his death for a Hindu widow's interest. It is proved that after her husband's death she, in order to discharge debts which had been contracted by Thakur Ranjit Narayan Singh, sold a moiety of Taluka Telwa to the Maharajah. In her suit the Thakurani claimed possession of one moiety of Taluka Telwa, as the widow of Thakur Ram Narayan Singh. The Maharajah in his suit claimed possession of the other moiety of

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Taluka Telwa as the vendee from the Thakurani Chaturbhuj Narayan Singh is in possession, and he and his minor sons deny that Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated.

The written statement of Chaturbhuj Narayan Singh in the suit of the Thakurani is not before this Board, but his written statement in the suit of the Maharajah is, having regard to the evidence and to the findings of the Courts below, instructive. In his written statement in the Maharajah's suit Chaturbhuj Narayan Singh alleged —

4 That the said family is governed by the Benares School of Hindu Law save and except that according to family custom the said ancestral zamindari descends according to the rule of primogeniture on the eldest male member of the eldest line and the junior members are entitled to maintenance and that females are in no way entitled to succeed to the said zamindari. The junior members even after khorposh or maintenance grants are made to them out of the joint property are entitled to obtain the expenses of marriage sadh and other similar ceremonies and all other necessary expenses from the income of the said property in the hands of the holder of the said estate for the time being.

5 That with reference to paragraph 3 this defendant states that Thakur Ranjit Narayan Singh succeeded to the said estate on the death of his father in accordance with the family custom aforesaid and that the mukurati settlement referred to in the said paragraph was also made in accordance with the said custom and not otherwise. This defendant craves leave to refer to the original of the said mukurati deed for the terms thereof. This defendant wholly denies that either before or after the said mukurati settlement Bhupat Narayan Singh became separate from the said Ranjit Narayan Singh or that he was at any time a partner in food worship or estate from the said Ranjit Narayan Singh or that he lived in a house separate from the said Bhupat Narayan Singh during his life time were joint in food worship and estate with the said Ranjit Narayan Singh and after his death with Thakur Ram Narayan Singh and that they never ceased to reside in the family dwelling house. This defendant continued joint in food worship and estate with the said Thakur Ram Narayan Singh until the latter's death and thereafter with the defendant No. 6 until shortly before the commencement of the registration proceedings when disputes and disagreement arose. The allegations to the contrary in paragraph 3 of the plaint are wholly false.

6 That assuming, though by no means admitted, that Bhupat Narayan Singh and the defendant became separate from Thakur Ranjit Singh in the year 1287 F.S. and since then he and the defendant were separate in all business and lived in a separate house as has been found by all in the plaint the defendant submits that nevertheless the impartible estate Taluka Telwa continued to remain joint family property in so far as it never was nor could be the subject of partition and the defendant No. 1 therefore became solely entitled to it and the family custom on the death of Thakur Rani Narayan Singh in preference to his widow.

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The defendant No. 1 mentioned in the written statement is Chaturbhuj Narayan Singh, and the defendant No. 6 is the Thakurani, who, as has been already stated, was a *pro forma* defendant in the suit of the Maharajah. So far as is now material, the defence of Chaturbhuj Narayan Singh, as disclosed by his written statement, was that females were by the family custom excluded from a succession to the impartible estate and that the joint family had not separated.

No custom excluding the widow of a sonless and separated holder of the impartible estate of Taluka Telwa from the succession to the estate for a Hindu widow's interest has been proved, and it is well decided law that the widow of the last holder of an impartible estate which descends by the rule of primogeniture is not excluded from the succession if her husband was in fact separated and died without issue male, and if no custom which would exclude her from the succession is proved. It was held by this Board in *Neelkanto Deb Burmono v. Beerchunder Thakoor* (1) that where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the custom. In *Ram Nundun Singh v. Janki Koer* (2) this Board held that—

There is no inconsistency between a custom of impartibility and

(1) (1869) 12 Moo I. A. 523

(2) (1902) I L R 29 Cal. 829

L II 29 I A 178

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the right of females to inherit, as may be illustrated by the well known *Shriagunga Case* (1) and therefore the general law must prevail unless it be proved that the custom extends to the exclusion of females

Consequently the only issue in these suits which is now material is one of fact, namely, the issue as to whether Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated

The Subordinate Judge came to the conclusion that Thakur Ranjit Narayan Singh, being displeased with his brother Bhupat Narayan Singh because the latter kept women, separated from him. It was found as a fact by the Subordinate Judge that Bhupat Narayan Singh built a pucca house about a *tussi* (120 feet) to the westward of the family house, established a *Tulsi Pinda* there, and removed his family to his pucca house and lived there separately from Thakur Ranjit Narayan Singh. As a fact Thakur Bhupat Narayan Singh built a wall between his pucca house and the family house of Thakur Ranjit Narayan Singh and established a separate *Thakurbari* in his house. The houses were quite separate houses, as was found by the Subordinate Judge on the evidence.

A daughter of Chaturbhuj Narayan Singh was married after Thakur Ranjit Narayan Singh had in 1879 granted the *mokurari* pottah to Bhupat Narayan Singh. Chaturbhuj Narayan Singh attempted to prove that Thakur Ranjit Narayan Singh defrayed the expenses of that marriage. The Subordinate Judge, however, found on incontestable evidence that the expenses of the marriage were defrayed by Bhupat Narayan Singh and not by Thakur Ranjit Narayan Singh. As a matter of fact, Bhupat Narayan Singh borrowed Rs. 689-2-6 for the expenses of that marriage, and on the 27th June 1897 gave to Shri Lal Modi and Amir Modi a mortgage of lands which he held under

the mukarran pottah to secure the repayment to them of, amongst other moneys, that sum of Rs. 689-2-6 which was stated in the mortgage deed to have been borrowed by him from them "for performing the marriage of my own granddaughter, i.e., the daughter of my son, Baba Chaturbhuj Narayan Singh."

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On the 27th April 1905 Chaturbhuj Narayan Singh, on his examination in a criminal case which apparently related to the removal of some timber, stated, "I am separate from the Thakur of Telwa."

On a careful review of all the evidence the Subordinate Judge came to the conclusion that Bhupat Narayan Singh and his son Chaturbhuj Narayan Singh were separate from Thakur Ranjit Narayan Singh and his son Thakur Ram Narayan Singh.

The learned Judges of the High Court, whilst accepting as correct the findings of facts of the Subordinate Judge on which he had come to the conclusion that there had been a complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh, came to the conclusion that it was not proved that there was a separation in intention and in fact. As it is difficult to understand the reasoning of the learned Judges of the High Court, it is better to give the following extracts from their joint judgment. They say —

"It is the case common to both sides that Bhupat Narayan was a man of licentious habits and that he made himself a nuisance to his brother Ranjit Narayan and created a scandal by introducing his mistresses into the family dwelling house. It was in consequence of this that Ranjit Narayan executed the maintenance grant in his favour in 1287 to enable him to start a separate establishment. There can be no doubt that, after receipt of the grant, Bhupat Narayan built himself a new house outside the old family dwelling and that in course of time a Thakurbari and a Tulsi Pinda were established in that house and that a wall of separation between his house and the family house was constructed. It seems to be also beyond doubt that after receipt of the grant Bhupat Narayan raised money by mortgages on the property leased to him and spent it on the

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 The fact that after the grant of the mukurari lease for maintenance Bhupat Narayan lived in a separate house alongside his family homestead that he and his branch of the family were afterwards separate in food and possibly in worship, and that he paid the expenses of his family out of the profits of the property granted to him for maintenance, by borrowing money on mortgages on that property, do not appear to us in this case to be sufficient to prove that there was a complete separation between Bhupat Narayan and Ranjit Narayan, by which Bhupat sacrificed his expectancy to succeed to the family property on the failure of nearer male heirs of Ranjit Narayan.

In the opinion of their Lordships, the evidence clearly proved that there had been complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh in worship, in food and in estate, and they find that there had been complete separation.

Their Lordships infer from the extracts which they have quoted from the judgment of the learned Judges of the High Court that those Judges considered that there could have been no complete separation of the joint family, as the impartible estate of Taluka Telwa

had not been partitioned between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh. Those learned Judges overlooked the fact that Bhupat Narayan Singh and his son had no coparcenary rights in the impartible estate and no rights in that estate which entitled them or either of them to a partition of the impartible estate. They could not have prevented Thakur Ranjit Narayan Singh from alienating that impartible estate in such a way as to determine any contingent interest they had in it under the custom. Their contingent interest under the custom was liable to be defeated by an alienation of the estate by Thakur Ranjit Narayan Singh even if the family had remained joint and as the family ceased to be a joint Hindu family the ordinary Hindu law of the Mitakshara gave to the Thakurani her widows an interest in the impartible estate in priority to the contingent interest of Chaturbhuj Narayan Singh under the custom. The Thakurani sold a moiety of the impartible estate to the Maharajah and as there was a valid necessity for that sale she conveyed a good title to the Maharajah.

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Then Lordships will humbly advise His Majesty that these consolidated appeals should be allowed that the decrees of the High Court should be set aside with costs and the decrees of the Subordinate Judge should be restored.

The respondents Chaturbhuj Narayan Singh and his four minor sons must pay the costs of the appeals.

Appeals allowed

Solicitors for the appellants *Downer & Johnson*
Solicitors for the respondents *T. L. Wilson & Co*

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marriage of members of his family and on their maintenance. Still are not all these acts such as might have been expected on the part of a member of the family who had received a grant for his maintenance? Or must they be accepted as incontestable proof of an intention to separate from Ranjit Narayan from the time of the grant and of a separation in fact from that time?

'It has not been contended before us, nor indeed could the contention be accepted as a sound one that a separation in estate and from the joint family must follow as a necessary consequence from the receipt of a maintenance grant

"The learned Subordinate Judge has accepted these facts coupled with the admitted separation in food as sufficient proof that from the date of the maintenance grant, Ranjit Narayan and Bhupat separated and ceased to be members of a joint Hindu family. We have given our careful consideration to the judgment of the Subordinate Judge and also to the evidence and the arguments of the learned pleader and counsel which have been advanced before us and even though we accept the findings of the Subordinate Judge we are unable to agree in his conclusion that the plaintiffs have proved that there was a separation in intention or in fact

The fact that after the grant of the mukurani lease for maintenance Bhupat Narayan lived in a separate house alongside his family homestead that he and his branch of the family were afterwards separate in food and possibly in worship, and that he paid the expenses of his family out of the profits of the property granted to him for maintenance, by borrowing money on mortgages on that property, do not appear to us in this case to be sufficient to prove that there was a complete separation between Bhupat Narayan and Ranjit Narayan, by which Bhupat sacrificed his expectancy to succeed to the family property on the failure of nearer male heirs of Ranjit Narayan

In the opinion of their Lordships, the evidence clearly proved that there had been complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh in worship, in food and in estate, and they find that there had been complete separation

Their Lordships infer from the extracts which they have quoted from the judgment of the learned Judges of the High Court that those Judges considered that there could have been no complete separation of the joint family, as the impartible estate of Taluka Telwa

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had not been partitioned between Thakur Rنجit Narayan Singh and his brother Bhupat Narayan Singh. Those learned Judges overlooked the fact that Bhupat Narayan Singh and his son had no coparcenary rights in the impartible estate and no rights in that estate which entitled them or either of them to a partition of the impartible estate. They could not have prevented Thakur Rنجit Narayan Singh from alienating that impartible estate in such a way as to determine any contingent interest they had in it under the custom. Their contingent interest under the custom was liable to be defeated by an alienation of the estate by Thakur Rنجit Narayan Singh even if the family had remained joint and as the family ceased to be a joint Hindu family the ordinary Hindu law of the Mitakshara gave to the Thakurani her widows interest in the impartible estate in priority to the contingent interest of Chaturbhui Narayan Singh under the custom. The Thakurani sold a moiety of the impartible estate to the Maharajah and as there was a valid necessity for that sale she conveyed a good title to the Maharajah.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed that the decrees of the High Court should be set aside with costs and the decrees of the Subordinate Judge should be restored.

The respondents Chaturbhui Narayan Singh and his four minor sons must pay the costs of the appeals.

Appeals allowed

Solicitors for the appellants Downer & Johnson
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J. V. W.

